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In the Supreme Court of the United States

OCTOBER TERM, 1999

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KENNETH I. TRUJILLO
IRA NEIL RICHARDS
TRUJILLO RODRIGUEZ & RICHARDS, LLC
The Penthouse
226 West Rittenhouse Square
Philadelphia, PA 19103
(215) 731-9004

W. NEIL EGGLESTON
Counsel of Record
TIMOTHY K. ARMSTRONG
JEANNE-MARIE S. RAYMOND
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner Allen W. Stewart

9218

QUESTIONS PRESENTED

Petitioner was convicted in federal court of mail and wire fraud offenses, and violations of RICO, arising out of the state-approved acquisition by Petitioner of an insurance company. The government contended that Petitioner's conduct rendered the acquired insurance company insolvent, a term defined by state insurance law. The government also introduced, over Petitioner's opposition, evidence it characterized as suggesting that Petitioner was preparing to flee the country before trial, even though Petitioner indisputably never fled or attempted to do so. Accordingly, the questions presented are:

1. Where a criminal defendant charged with mail fraud (18 U.S.C. § 1341) is not alleged to have personally mailed any matter, but only to have caused others to do so, what standard of scienter is requisite to the section 1341 offense?

2. Whether the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) bars a federal criminal RICO prosecution arising out of allegations of insurance fraud, where the transactions at issue were approved by state regulators and the federal government sought and obtained the forfeiture of a state-chartered insurance company?

3. Where evidence the trial court characterizes as reflecting the defendant's "flight" is introduced in federal criminal cases to suggest the defendant's consciousness of guilt, by what standard should the court determine whether the evidence is admissible, or supports a special jury instruction on "flight" and the permissible inferences therefrom?

4. Whether a state-issued insurance license is "property," the taking of which pursuant to a scheme to defraud may constitute mail or wire fraud (in violation of 18 U.S.C. §§ 1341 or 1343), a question as to which the courts of appeals are divided?

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No. 99-_____

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Allen W. Stewart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals, affirming Mr. Stewart's conviction and sentence (App. 1a–25a), is reported at 185 F.3d 112. The court's order of August 18, 1999, denying Mr. Stewart's timely filed petition for rehearing or *en banc* reconsideration (App. 26a–28a), is unreported.

The district court's order of February 21, 1997, denying Mr. Stewart's motion to dismiss the RICO charge as barred by the McCarran-Ferguson Act (App. 29a–39a), is reported at 955 F. Supp. 385. The district court's order of October 23, 1997, denying Mr. Stewart's motion to dismiss the mail and wire fraud charges for failing to allege any scheme to "obtain[] money or property" by fraud (App. 40a–46a), is unreported. The district court's order of November 10, 1997, denying Mr. Stewart's motion *in limine* to exclude so-called "flight" evidence (App. 47a), is unreported. The

district court's Judgment and Supplemental Preliminary Order of Forfeiture of March 26, 1998 (App. 48a–49a) is unreported.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Third Circuit rendered the decision sought to be reviewed on July 16, 1999. That court denied a timely filed petition for rehearing or reconsideration *en banc* on August 18, 1999. This Court has jurisdiction to review the Third Circuit's decision on certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The statutory provisions at issue here are reproduced in the Appendix pursuant to S. Ct. R. 14.1(f). (App. 50a–52a). The relevant statutes are the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015), as well as the provisions of Title 18, U.S.C., dealing with liability of principals (§ 2), mail fraud (§ 1341), wire fraud (§ 1343), and racketeer influenced and corrupt organizations (§ 1962).

STATEMENT OF THE CASE

A federal jury convicted Petitioner Allen W. Stewart, formerly a senior partner with the law firm of Morgan, Lewis & Bockius, of multiple counts of mail and wire fraud and one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The convictions arose out of the acquisition and eventual sale by Mr. Stewart of an Ohio insurance company, which Mr. Stewart redomesticated as a Pennsylvania corporation with the same name. The prosecution charged, *inter alia*, that Mr. Stewart's conduct rendered the corporations insolvent, as that term was defined by state laws governing the accounting of insurance companies, and alleged that Mr. Stewart had contrived to conceal this fact from insurance regulators in those states. The trial judge sentenced Mr. Stewart to 15 years' imprisonment and ordered substantially all his assets, including a state-chartered insurance company, forfeited to the federal government. The U.S. Court of Appeals for the Third Circuit affirmed the conviction and sentence.

The trial court rejected Mr. Stewart's argument that the McCarran-Ferguson Act, 15 U.S.C. § 1011–1015, barred a federal RICO prosecution grounded upon allegations that a defendant's conduct had not satisfied state insurance accounting rules. In a trial

otherwise dominated by highly involved recountings of very complex financial transactions, the trial court, over Mr. Stewart's opposition, permitted the prosecution to introduce voluminous evidence that proved nothing about the transactions at issue, but suggested to the lay jury that Mr. Stewart posed a possible risk of flight. The trial court also denied motions filed by Mr. Stewart to dismiss the indictment as not stating an offense under the relevant provisions. The court of appeals affirmed, in an opinion that expressly declined to address a majority of the issues the parties had extensively briefed on the appeal, and subsequently denied a petition for rehearing or *en banc* reconsideration.

REASONS FOR GRANTING THE WRIT

I.
THE COURT OF APPEALS ELIMINATED THE SCIENTER REQUIREMENT FROM THE STATUTORY OFFENSE OF MAIL FRAUD WHEN THE DEFENDANT WAS NOT ALLEGED PERSONALLY TO HAVE MAILED ANY MATTER, BUT ONLY TO HAVE CAUSED OTHERS TO DO SO

The great majority of the charges against Mr. Stewart—Counts 2–19 and 33–120, and also "Acts" 1D–1W in the Superseding Indictment—involved allegations of mail fraud in violation of 18 U.S.C. § 1341. That statute defines an offense if, for the purpose of executing a scheme to defraud, a defendant mails, or "*knowingly* causes" to be mailed, certain communications. 18 U.S.C. § 1341 (emphasis added).[1] By its terms, the statute forbids, on the one hand, a defendant's own placing of a communication in the mails,

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[1] In relevant part, the statute provides that one commits an offense if, for the purpose of executing a fraudulent scheme, he:

> *places* in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . *or knowingly causes to be delivered* by mail . . . any such matter or thing[.]

18 U.S.C. § 1341 (emphasis added). Other portions of section 1341 criminalize "tak[ing] or receiv[ing]" mail matter from an authorized depository, but none of the charges against Mr. Stewart involved "taking or receiving" mail matter, and these provisions are irrelevant to the instant case.

and on the other, a defendant's knowingly causing a delivery by mail. The latter—causing delivery by mail—expressly carries the statutory scienter requirement of "knowingly," which must always be pleaded and proved where the defendant is not alleged to have mailed an item himself, but only to have caused others to do so.[2] Mr. Stewart was not alleged to have mailed personally any of the communications underlying the mail fraud charges, and there is no evidence that he did so. Rather, the terms of the indictment and the government's proof all proceeded from a theory that Mr. Stewart caused others—specifically, employees of his companies—to mail the communications at issue.

The indictment, however, omitted the scienter requirement. It did not accuse Mr. Stewart of "plac[ing] * * * or knowingly caus[ing] to be delivered" any of the mailed matter that was the subject of the charges. Rather, using terms not found in the statutory text, the indictment alleged that

> the defendant,
>
> ALLEN W. STEWART,
>
> for the purpose of executing the scheme and artifice described above and attempting to do so, caused to be placed in an authorized depository for mail matter the documents described below to be sent and delivered by the United States Postal Service[.]

(CA JA 1240 (Acts 1F, 1P–1V), 1253 (Counts 2–19), 1270 (Counts 33–120)).[3] In so charging, the Superseding Indictment omitted the

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[2] This Court discussed the "knowingly caused" element of section 1341 in *Pereira* v. *United States*, 347 U.S. 1, 8–9 (1954):

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

Ibid. (citation omitted).

[3] Citations herein to the parties' Joint Appendix in the court of appeals will be rendered as "CA JA"; citations to the first Supplemental Appendix filed by the government as "CA SA"; and citations to the government's principal brief in the court of appeals as "Gov't CA Br."

"knowingly" element of the offense the statute requires when the defendant is not alleged to have mailed an item himself, but to have caused others to do so.

Mr. Stewart complained that the indictment was defective because it omitted a necessary element of the charged offense. The court of appeals, however, rejected this argument. The court of appeals reasoned that, because 18 U.S.C. § 2(b) imposes liability on one who causes another to commit a crime, the indictment could permissibly charge Mr. Stewart with "causing [mail] to be placed" in an authorized depository, because "plac[ing]" itself was an offense under section 1341. In full, the court of appeals' reasoning was as follows:

> We hold that inasmuch as 18 U.S.C. § 1341 does not require the "knowing" placing of a communication in an authorized depository for mail matter, the indictment correctly charged Stewart with causing communications to be placed in an authorized depository for mail matter. Use of the term "caused to be placed" in the indictment referred to the fact that a defendant can be held responsible for actions that he orders or directs another to perform. *See* 18 U.S.C. § 2(b). The jury was instructed on this theory of criminal responsibility. Joint app. at 3018–19. Conversely, Congress added the reference to "knowingly causes to be delivered" in section 1341 to ensure that a defendant would not be held responsible for fraudulent mailings where he unknowingly processes a piece of mail or otherwise is involved unwittingly with fostering the material's delivery. Because of this distinction, we hold that the indictment properly charged Stewart with mail fraud.

(App. 14a–15a). The jury instructions the court of appeals cited to support its statement that "[t]he jury was instructed on this theory of criminal responsibility [under 18 U.S.C. § 2(b)]" provided as follows:

> In order to sustain its burden of proof on each count of the superseding indictment it is not necessary for the Government to prove that the defen-

> dant, Allen Stewart, personally did every act constituting the offenses charged. As a general rule whatever any person is legally capable of doing himself he can do through another as his agent. So if the defendant *deliberately orders or directs the acts or conduct of another or the defendant deliberately authorizes or consents to the acts or conduct of another*, then you must treat such acts or conduct just the same as if the defendant had personally done them.

(CA JA 3018–3019) (emphasis added).[4]

In addition to being legally erroneous, this ruling by the court of appeals conflicts in two separate respects with decisions of its sister Circuits and with this Court. First, the court's decision conflates the distinct statutory mental states of *knowledge* and *willfulness*—the jury instructions address only the former, while section 2(b) requires the latter. In so doing, the decision contravenes this Court's decisions in *Bryan* v. *United States*, 524 U.S. 184 (1998), and *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). Second, the court's decision approves the defective indictment based on section 2(b), even though the indictment did not charge a violation of section 2(b) and the jury was not instructed on this theory. In so holding, the court of appeals' decision conflicts with decisions of its sister courts of appeals regarding what appropriate language should appear in the indictment when a defendant is not alleged to have culpably performed some act himself, but only to have caused others to do so. Each of these defects in the court of appeals' reasoning will be considered in turn.

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[4] The trial court gave this instruction over Mr. Stewart's objection that it "dilute[d] the accessory liability elements[.]" (CA JA 3057).

A. The Court's Decision Equates Knowledge With Willfulness, Contrary To This Court's Decisions In *Bryan* And *Ratzlaf*.

1. Section 2(b) establishes the express scienter requirement of willfulness.

18 U.S.C. § 2(b) includes an express scienter requirement where liability is sought to be imposed under that section. The statute provides:

> Whoever *willfully* causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(b) (emphasis added). In this respect, section 2(b) differs from its companion provision, 18 U.S.C. § 2(a), which includes no express scienter requirement. (App. 51a).

The statutory history of section 2(b) reflects an express decision by Congress to impose a different, and higher, standard of scienter for violations of that section. Significantly, as enacted in the 1948 codification of 18 U.S.C., section 2(b) omitted any scienter provision. Section 2, as enacted in 1948, read:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Pub. L. No. 80-772, § 2, 62 Stat. 683, 684 (1948). Three years later, Congress amended section 2(b)—but not section 2(a)—to impose a new standard of scienter. The 1951 amendments modified section 2(b) to read as follows:

> Whoever *willfully* causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Pub. L. No. 82-248, § 17b, 65 Stat. 710, 717 (1951) (emphasis added). The same act left section 2(a) substantively unaltered. See *ibid.*

"When Congress acts to amend a statute," the law "presume[s] it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995). This settled principle of construction strengthens the inference that is obvious on the face of the 1951 amendment to section 2(b)—that Congress purposefully imposed a new scienter requirement of "willfulness" where it previously had not existed.[5] See also *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) ("cardinal principle of statutory construction" is "to give effect, if possible, to every clause and word of a statute") (internal quotations omitted); *Ratzlaf*, 510 U.S. at 140–141 (lower courts "treated [the statute's] 'willfulness' requirement essentially as surplusage—as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."). The fact that Congress left untouched the aiding and abetting provision in section 2(a) in the 1951 amendments further underscores the point that the two sections are not mirror images, but rather involve distinct elements which, in the case of section 2(b), include an express scienter requirement of "willfulness." See *Markham* v. *Cabell*, 326 U.S. 404, 411 (1945) ("the normal as-

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[5] Although few reported cases address the scienter requirements of a section 2 violation, such precedents as do exist support reading section 2(b) in conformity with its literal text. See, *e.g.*, *United States* v. *Curran*, 20 F.3d 560, 568 (3d Cir. 1994) ("'[w]illfulness' in this context is an important component of section 2(b)"); *United States* v. *Lugo-Baez*, 412 F.2d 435, 440 (8th Cir. 1969) ("the jury was told that willfulness was an essential element of the crime of aiding and abetting"), cert. denied, 397 U.S. 966 (1970); *United States* v. *Schwartz*, 398 F.2d 464, 470 (7th Cir. 1968) (approving jury instruction "that the defendant would not be guilty as an aider and abettor unless he 'willfully seeks by some action of his to make it [the criminal venture] succeed'"), cert. denied, 393 U.S. 1062 (1969); *United States* v. *Trie*, 21 F. Supp. 2d 7, 15 (D.D.C. 1998) ("under Section 2(b) the government must prove that the defendant willfully caused a prohibited act"); *United States* v. *Cardoen*, 898 F. Supp. 1563, 1568 (S.D. Fla. 1995) ("under 18 U.S.C. § 2, the government must prove that the aider and abettor willfully associated himself with the substantive crime charged, and willfully participated in it"), aff'd *sub nom. United States* v. *Johnson*, 139 F.3d 1359 (11th Cir. 1998), cert. denied, 119 S. Ct. 2365 (1999).

sumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible.").

2. "Knowledge" and "willfulness," as used in the criminal law, represent distinct, not coextensive, mental states.

In recent cases, this Court has examined the significance of the use of the term "willfully" to define the scienter element of a criminal offense. "Willfulness" is not the mirror image of "knowledge," but rather carries with it the additional requirement of awareness on the defendant's part that he is violating the law—a requirement not found in the jury instructions on which the court of appeals relied in this case as satisfying the elements of section 2(b).

This Court addressed the issue at some length in *Bryan* v. *United States*, 524 U.S. 184 (1998). *Bryan* involved a charge that the defendant unlawfully trafficked in firearms without a license, violating, *inter alia*, 18 U.S.C. § 924(a)(1)(D), which imposed a penalty if the defendant "willfully violate[d] any other provision of this chapter[.]" The other subparagraphs of section 924(a)(1) all contained a "knowingly" scienter provision, and the question presented in the case was what meaning should attach to the distinct "willfully" requirement found in subparagraph (D).

The Court in *Bryan* gave the following description of the meaning of the statutory term "willfully" where, as in section 2(b), it is used to specify the scienter element of a criminal offense:

> [I]n the criminal law ["willfully"] also typically refers to a culpable state of mind. * * * [W]hen used in the criminal context, a "willful" act is one undertaken with a "bad purpose." In other words, in order to establish a "willful" violation of a statute, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."

Bryan, 524 U.S. at 191–192 (citations and footnotes omitted).

This Court rejected the petitioner's contention in that case that the "willfully" provision required the prosecution to demonstrate that the defendant knew that his conduct violated the specific federal licensing requirement. See *Bryan*, 524 U.S. at 197–199. Nevertheless, this Court held, the statutory scienter element *did* require the prosecution to prove (and the jury to find) that the defendant had "knowledge that the conduct is unlawful," even if the defendant was ignorant of the specific provision under which he was charged. *Id.* at 196.

This Court specifically differentiated the scienter requirement of "willfulness" from the alternative requirement of "knowledge," a mental state requisite to some criminal offenses. This Court explained:

> the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." * * * Thus, unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.

Bryan, 524 U.S. at 192–193 (citations and footnotes omitted).[6]

This Court's decision in *Bryan* relied to a significant degree on its previous holding in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), another case involving the interpretation of a scienter requirement in a criminal offense. *Ratzlaf* involved the construction

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[6] See also *United States* v. *James*, 172 F.3d 588, 591–592 (8th Cir. 1999) (*Bryan* "defined 'willful' broadly to include an act 'undertaken with a bad purpose' * * * 'knowledge that the conduct is unlawful is all that is required' "); *United States* v. *Chowdhury*, 169 F.3d 402, 406 (6th Cir. 1999) (defining "willful act" as requiring "the government [to] prove more than the defendant's knowledge of the facts that constitute the offense, as is required by a statute punishing knowing violations of the law"); *United States* v. *Bostic*, 168 F.3d 718, 722 (4th Cir.) (" '[b]ecause "willful" generally connotes a conscious performance of bad acts with an appreciation of their illegality, * * * we can conclude that Congress intended to provide a different and lesser standard when it used the word "knowingly" ' "), (citations omitted), cert. denied, 119 S. Ct. 2383 (1999).

of 31 U.S.C. § 5322(a), which established criminal sanctions for persons "willfully violating" certain bank currency transaction reporting requirements. *Id.* at 136. This Court analogized from precedents "describ[ing] a 'willful' actor as one who violates 'a known legal duty.' " *Id.* at 142 (citations omitted). The need to preserve the meaning of this "willfulness" requirement was particularly acute where, as in the currency transaction context, the conduct at issue was "not inevitably nefarious," *id.* at 144, and could be engaged in innocently. Because Congress had limited the reach of section 5322(a) to "willful" violators of the law, this Court concluded that "the jury had to find [the defendant] knew the structuring in which he engaged was unlawful." *Id.* at 149 (footnote omitted). Accordingly, *Ratzlaf* provides additional support for the view that where Congress limits criminal penalties only to "willful" violators, as 18 U.S.C. § 2(b) expressly provides, the jury must be instructed that the defendant knew of the unlawfulness of his conduct. See *ibid.* (reversing and remanding "[b]ecause the jury was not properly instructed in this regard[.]").[7]

3. The court of appeals relied on a jury instruction on knowledge, where section 2(b) requires the different standard of willfulness, contrary to this Court's decisions.

In the wake of *Bryan* and *Ratzlaf*, where the statute at issue requires proof that the defendant acted willfully, a jury must be instructed that the defendant knew of the unlawfulness of his conduct, and an instruction on the mental state of "knowledge," which omits this component of willfulness, will not suffice. In its effort to salvage the indictment's complete failure to allege any scienter element of the mail fraud offense, however, the court of appeals committed precisely this error: it adverted to a jury instruction on knowledge that did not, as the court of appeals contended, amount to an instruction under section 2(b), which requires proof of "willfulness."

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[7] Cf. also *United States* v. *Yermian*, 468 U.S. 63, 75–84 (1984) (Rehnquist, J., dissenting) (statutory scienter element of "knowingly and willfully" should be interpreted, under the rule of lenity, to require proof of defendant's awareness that alleged false statements were within the jurisdiction of a federal agency).

The court of appeals referred to a jury instruction that allowed the jury to convict Mr. Stewart if he "deliberately order[ed] or direct[ed] * * * [or] deliberately authoriz[ed] or consent[ed] to the acts or conduct of another[.]" See *supra* at 6. Entirely absent from this formulation, however, is the core component of "willfulness"—namely, the defendant's awareness of the unlawfulness of his conduct. See *Bryan*, 524 U.S. at 196. The instructions on which the court of appeals relied were in the nature of instructions on knowledge. But section 2(b) expressly requires willfulness. In short, it is simply not accurate to say, as the court of appeals did, that "[t]he jury was instructed on [the section 2(b)] theory of criminal responsibility" (App. 14a), for the instructions omitted the key scienter element of that theory.[8]

The court of appeals, in an effort to cure an indictment that was fatally defective in failing to charge the scienter element of mail fraud, itself bungled the scienter requirement inherent in the statute it cited. It cited an instruction that did not in fact accurately instruct the jury that Mr. Stewart could be convicted for others' mailings under 18 U.S.C. § 2(b)—contradicting this Court's decisions in *Bryan* and *Ratzlaf* and compounding, rather than curing, the indictment's failure to charge the scienter element of mail fraud. The court's opinion leaves hopelessly muddled the question what standard of scienter must be satisfied where a defendant charged with mail fraud is not alleged personally to have mailed any matter, but only to have done so vicariously through the mailings of others. The resulting confusion in this area of frequent

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[8] Commentators have stressed the need for jurors to receive clear guidance on the "willfulness" element of a section 2(b) charge. One guide proposed including the following language, which is notable for its contrast with the instruction on which the court of appeals here relied:

> "[W]illfully caused" . . . does not mean that the defendant himself need have committed the crime or supervised or participated in the actual criminal conduct charged in the indictment.
>
> The meaning of the term "willfully caused" can be found in the answers to the following questions: First, did the defendant take some action without which the crime would not have occurred? Second, did the defendant intend that the crime would be actually committed by others?

1 HON. LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 11.01, Instr. 11-3 (1998).

prosecution,[9] coupled with the conflict the court of appeals' opinion presents with this Court's decisions in *Bryan* and *Ratzlaf*, well commends this case for review by this Court.[10]

B. The Court Of Appeals' Interpretation Diverges From The Holdings Of Other Courts Concerning What Language The Government Must Include In An Indictment To Invoke 18 U.S.C. § 2(b).

In construing 18 U.S.C. § 2(b) to cure the indictment's complete failure to charge the scienter element of mail fraud, the court of appeals also created an inconsistency with other decisions concerning what language must appear in the indictment to charge adequately a violation of section 2(b). Simply put, Mr. Stewart's indictment on the mail fraud counts never mentioned section 2(b) or otherwise suggested that it was based on any statute other than the specific ones charged therein.[11]

Many courts of appeals have held that section 2(b), perhaps unique among all federal criminal statutes, is implicit in every in-

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[9] Although mail fraud is a frequently prosecuted offense, the significance of the statute is magnified still further by the fact that mail fraud serves as one of the most—perhaps *the* most—common predicate acts alleged in civil and criminal RICO proceedings.

[10] See also *United States* v. *Leppo*, 177 F.3d 93, 95–97 (1st Cir. 1999) (reviewing authorities on meaning of section 2(b)'s "willfulness" requirement, but not citing either *Bryan* or *Ratzlaf*), pet. for cert. filed, 68 U.S.L.W. 3291 (U.S. Nov. 2, 1999) (No. 99-667); *United States* v. *Gabriel*, 125 F.3d 89, 100–102 (2d Cir. 1997) (holding, in a decision antedating *Bryan* but postdating *Ratzlaf*, that section 2(b) does not require proof of willfulness; expressly disagreeing in this respect with the decision of the Third Circuit in *Curran*, cited *supra* note 5); *United States* v. *Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (statutory scienter element of "willfully" embodies "a heightened *mens rea* standard [that] should only require proof that Dr. Jain knew that his conduct was wrongful, rather than proof that he knew it violated 'a known legal duty' "), cert. denied, 520 U.S. 1273 (1997); *United States* v. *Dashney*, 937 F.2d 532, 538 (10th Cir.) (" 'a requirement that the conduct be "willful" generally "means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law" ' ") (citations omitted), cert. denied, 502 U.S. 951 (1991).

[11] In contrast, the indictment on the section 1957 charges expressly charged Mr. Stewart with violating 18 U.S.C. § 2. (CA JA 1283, 1285–1290).

dictment and need not be expressly included or referenced in any form.[12] Other courts, however, have held that some reference to section 2(b) must or should be charged in the indictment before a defendant can be convicted thereunder.[13] The latter authorities appear more persuasive; particularly where the relevant statute, section 2(b), includes an express scienter requirement of willfulness, the omission of this element from an indictment would appear to stand at odds with the long line of authorities requiring indictments to contain all elements of the offenses charged. See, *e.g.*, *Jones* v. *United States*, 526 U.S. 227, —, 119 S. Ct. 1215, 1219 (1999) ("elements [of an offense] must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt"); *United States* v. *Carll*, 105 U.S. 611, 613 (1881) ("This indictment, by omitting the allegation * * * that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime.").

The apparent division within the lower courts as to the necessity for the indictment to charge a violation of section 2(b) when vicarious liability is the only basis for the offense forms an addi-

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[12] See, *e.g.*, *United States* v. *Sabatino*, 943 F.2d 94, 99–100 (1st Cir. 1991); *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1099 n.3 (11th Cir. 1983); *United States* v. *Perry*, 643 F.2d 38, 45–46 (2d Cir.), cert. denied, 454 U.S. 835 (1981); *Pigford* v. *United States*, 518 F.2d 831, 834 (4th Cir. 1975); *United States* v. *Bullock*, 451 F.2d 884, 888 (5th Cir. 1971); *United States* v. *Sannicandro*, 434 F.2d 321, 324 (9th Cir. 1970); *United States* v. *Lugo-Baez*, 412 F.2d 435, 440 (8th Cir. 1969), cert. denied, 397 U.S. 966 (1970); *United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967); *United States* v. *Koptik*, 300 F.2d 19, 22 (7th Cir.), cert. denied, 370 U.S. 957 (1962).

[13] See, *e.g.*, *United States* v. *Salliey*, 360 F.2d 699, 701 (4th Cir. 1966) ("words of 'similar import' " to "willfulness" necessary under section 2(b)); *Finn* v. *United States*, 256 F.2d 304, 306 (4th Cir. 1958) ("[w]here willfulness or knowledge is made an element of the crime, the statutory requirement is not to be ignored[, and] [t]he charge must either include these terms, or words of similar import"). Cf. *United States* v. *Taylor*, 464 F.2d 240, 242 n.1 (2d Cir. 1972) ("preferable" that indictment expressly charge section 2(b) if prosecution wishes to proceed on that theory) (Friendly, J.); *United States* v. *Duke*, 409 F.2d 669, 671 (4th Cir. 1969) ("better practice" would be expressly to charge section 2 violation where that is basis of prosecution), cert. denied, 397 U.S. 1062 (1970); *Logsdon* v. *United States*, 253 F.2d 12, 14 (6th Cir. 1958) (fraud indictment adequate under 18 U.S.C. § 2 because it included charge that defendant "did willfully misapply").

tional factor counseling review on certiorari. This is especially so where, as here, the substantive statute included one express scienter requirement applicable when the defendant was not alleged personally to have mailed any matter, but only to have caused others to do so; the indictment did not charge this scienter element or any other; the court of appeals held the defect non-fatal because the defendant could have been charged under section 2(b); the defendant was not charged under section 2(b); and section 2(b) itself contained an express scienter element that was neither charged nor given in instructions to the jury. Permitting the court of appeals' decision to stand in these circumstances will not only deprive the lower courts of a uniform pleading standard for evaluating alleged violations of section 2(b), but will hopelessly muddy the question what standard of scienter the prosecution must allege and prove in a mail fraud case where the defendant indisputably mailed none of the communications that form the basis for his conviction. For these reasons, the writ should issue.

II.
THE MCCARRAN-FERGUSON ACT BARRED THIS FEDERAL CRIMINAL PROSECUTION

Count 1 of the indictment accused Mr. Stewart of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). It was absolutely clear from the indictment, however, that the basis of the prosecution's RICO claim was alleged regulatory misconduct in connection with state-chartered insurance companies. Indeed, so tightly intertwined was the conduct at issue with the business of insurance that the government felt compelled to include a lengthy description of what it termed "The Regulatory Environment" in the indictment itself. (CA JA 1224–1227).[14]

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[14] This lengthy exegesis included the federal government's beliefs regarding how insurance companies compute financial statements for submission to state regulators (CA JA 1225), how to distinguish " 'admitted' assets [from] 'non-admitted' assets" (*ibid.*), what were the requirements of "the published valuation standards and procedures of the National Association of Insurance Commissioners" (or "NAIC") (*ibid.*), the meaning and computation of "[a]n insurance company's obligation to pay claims in the future * * * generally referred to as a 'reserve' li-

Mr. Stewart moved before trial to dismiss the indictment on the grounds that the federal RICO prosecution would contravene the McCarran-Ferguson Act. The pertinent portion of the Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance[.]

15 U.S.C. § 1012(b). The district court denied the motion. First, it cursorily declared that the challenged activities alleged in the indictment did not constitute the "business of insurance." (App.

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ability" (*ibid.*), what steps an insurance company could take to "reduce its liabilities by making arrangements for another company to assume the obligation of paying future claims, or a portion of future claims on all, or a portion, of its policies" (*id.* at 1226), the computation of " 'capital and surplus' " and the rule that "if the admitted assets of a company did not exceed its liabilities by a certain amount, the [state] regulators could declare the company 'statutorily' insolvent" (*ibid.*), the circumstances under which state regulators could order an insurance company "to cease and desist its operations in their state, and, if domiciled in their state, could place it under their supervision, could place it under conservatorship or rehabilitation, or could liquidate it and divest its owners of their control and interest" (*ibid.*), the "generally accepted practice for financial statements to be sworn to and to conform to NAIC standards" and whether that "generally accepted practice" was followed in this case (*id.* at 1226–1277), and explanations of related financial reporting, rating, and disclosure requirements (*id.* at 1227). The prosecution contended that Mr. Stewart and the companies with which he was associated had violated "NAIC standards" in valuing the assets set aside to fulfill policyholder reserve requirements (*id.* at 1235); had entered into numerous "reinsurance agreements" (*id.* at 1236, 1246–1247, 1259–1264); and had violated insurance accounting laws and state regulations specifically designed to ensure policyholders' security and the payment of policyholder claims, regulations applicable *only* to insurance companies. (*Id.* at 1237). Virtually all the mailings and wirings underlying the indictment's mail and wire fraud counts consisted of statutorily mandated communications with or submissions to state insurance regulators, or other filings required by state insurance law. (See, *e.g.*, *id.* at 1240, 1241–1243, 1253–1255, 1265–1266, 1270–1281). The government's principal witness that Mr. Stewart had engaged in illegal conduct was its expert, Mr. Kauth, who testified for three full days concerning his opinion that the applicable state insurance laws did not permit the financial transactions in which Mr. Stewart engaged. (See, *e.g.*, *id.* at 2547–2569).

35a).[15] Second, it held that, even if the challenged activities involved the business of insurance, a federal RICO prosecution based on those actions would not "invalidate, impair, or supersede" any state insurance law. (App. 35a–39a). Mr. Stewart challenged the district court's ruling on appeal, and it was the subject of extensive briefing by both parties, but the court of appeals affirmed the district court without analysis of the issue. (App. 7a n.3).

Last Term, this Court construed the McCarran-Ferguson Act's "invalidate, impair, or supersede" language in the context of a civil RICO lawsuit against an insurance company. See *Humana, Inc.* v. *Forsyth*, 525 U.S. 299, 119 S. Ct. 710 (1999).[16] In *Humana*, the Court rejected an insurer's contention that the McCarran-Ferguson Act barred a civil RICO lawsuit brought by beneficiaries of group health insurance policies the insurer had issued. The beneficiaries alleged, in essence, that the insurer had conspired with an affiliated hospital artifically to reduce the portion of the beneficiaries' hospital charges paid by the insurer, and consequently, to increase the portion of the charges borne by the beneficiaries themselves. See 119 S. Ct. at 714. The source of the alleged conflict between federal and state law, according to the defendant, focused on the disparate (and greater) remedies available to civil RICO plaintiffs than would have been available under the administrative apparatus state law established for remedying insurance fraud. See *id.* at 715.

This Court ruled that the availability of treble damages and other RICO penalties, which were not available under the state's regulatory scheme, did not create a sufficient conflict with the state regulatory apparatus to implicate the McCarran-Ferguson Act's bar on federal lawsuits. Rejecting both "any suggestion that Congress intended to cede the field of insurance regulation to the States" as well as "the polar opposite of that view, *i.e.*, that Congress intended a green light for federal regulation whenever the federal law does not collide head on with a state regulation[,]" *id.* at 717,

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[15] But see *infra* note 27 (licensing of insurance companies is part of the "business of insurance" as that term is used in the McCarran-Ferguson Act).

[16] Mr. Stewart's opening brief in the court of appeals noted that this Court's then-pending decision in *Humana* would address the "invalidate, impair, or supersede" language of 15 U.S.C. § 1012(b). The *Humana* decision was issued while briefing was ongoing in the court of appeals.

this Court formulated the following test for determining when section 1012(b) would operate to bar a federal proceeding:

> When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Ibid. (citation omitted). In the wake of *Humana*, this standard has begun to be applied and developed in the lower courts as a guide to determining the scope of the McCarran-Ferguson Act's bar on federal proceedings. See, *e.g.*, *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999) (McCarran-Ferguson Act bars application of section of Americans With Disabilities Act to terms of insurance policies; "if federal courts are now to determine whether caps on disabling conditions * * * are actuarially sound and consistent with principles of state law they will be stepping on the toes of state insurance commissioners") (Posner, C.J.); *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999) (McCarran-Ferguson Act bars civil RICO lawsuit; "[t]he alleged activities of [certain defendants] in scheming to sell LaBarre higher-priced VSI insurance rather than LPD insurance are governed by Minnesota's insurance law"); but cf. *BancOklahoma Mortgage Corp.* v. *Capital Title Co.*, No. 97-5186, 1999 WL 828725 (10th Cir. Oct. 18, 1999) (civil RICO claim not barred by McCarran-Ferguson Act).[17]

The criminal context of this case carries important implications for the scope of the McCarran-Ferguson Act's bar on federal proceedings; implications that were discussed at length in the parties' briefs below, but went entirely unrecognized in the decision of the

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[17] It is also relevant that Congress in 1994 enacted a new crime of insurance fraud. See 18 U.S.C. § 1033. The fact that Congress deemed it necessary to enact a separate statute specifically relating to the business of insurance strongly suggests its recognition that the McCarran-Ferguson Act's bar precluded resort to the ordinary mail and wire fraud statutes in such cases. Mr. Stewart was not charged under section 1033. Significant for the instant case, and further indicative of the legislature's views on the scope of proper federal involvement in matters of insurance, is the fact that section 1033 is not included among the RICO predicate offenses specified in 18 U.S.C. § 1961(1).

court of appeals. The criminal enforcement of RICO threatens potentially far greater intrusion on state regulatory schemes than the mere prospect of a civil damages award against an insurer, as was at issue in *Humana*.

To take only the most stark of several examples provided by the record in this case, the criminal prosecution of Mr. Stewart resulted in the forfeiture of a state-chartered insurance company to the federal government. By order of March 26, 1998, the district court ordered Conestoga Life Assurance Company ("Conestoga"), a Pennsylvania corporation, forfeited to the United States government in partial satisfaction of the criminal sanctions imposed on Mr. Stewart. (App. 48a–49a) (CA JA 3245–3247). The district court thereafter appointed a trustee to effect the sale of Conestoga and its subsidiaries. (*Id.* at 3248–3254).

The Conestoga forfeiture represented the height of federal interference in what are quintessentially matters of state insurance law, subject to the exclusive regulation of state insurance agencies: the licensing, operation, acquisition, and sale of a state insurance company. This is a far more intrusive involvement by the federal government in the state insurance regulatory process than was at issue in *Humana*; more extensive by far than this Court, or any other our research has uncovered, has ever previously permitted under the McCarran-Ferguson Act.[18]

Indeed, such an intrusion could readily frustrate a state's own regulatory apparatus established to protect the state's policyholders

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[18] The forfeiture of state insurance companies ordered by the federal court placed state insurance regulators in the extraordinary position of petitioning the United States Department of Justice for "remission or mitigation of [the] forfeiture." (CA SA 5446a). In a series of letters in the summer and fall of 1998, the Department's Asset Forfeiture and Money Laundering Section granted, "conditionally and in part" (*ibid.*), petitions filed by the Pennsylvania Insurance Commissioner seeking the remission of some insurance company assets that had been forfeited to the federal government. (See *id.* at 5446a–5451a). Whatever the appropriate division of federal and state powers to regulate insurance under the McCarran-Ferguson Act, it seems impossible to conceive that Congress contemplated requiring state insurance commissioners to petition the United States Department of Justice (which presumably could exercise its own discretion to grant or deny the petition) to dispose of the assets of a state-chartered, state-regulated insurance company in a fashion consistent with state law.

from fraud. Every state has its own regulations controlling the submission of required financial reports by insurance companies domiciled in that state to state regulatory bodies. These provisions aid in the detection and deterrence of fraud, and also provide remedies to provide recompense to the citizens of that state in the event of fraud or insolvency of an insurer.

These comprehensive regulatory schemes are entirely frustrated if the federal government can end-run the process by forfeiting an insurance company and then, in its discretion, parceling out such portions of the forfeited assets back to state regulators as it deems fit.

Indeed, an interpretation of the McCarran-Ferguson Act to allow the prosecution in this case raises issues of constitutional dimension, because of the existence of a state court judgment resolving litigation between Mr. Stewart and the Ohio Insurance Department arising out of the same conduct underlying the federal prosecution. In that case, the parties entered into a settlement agreement releasing and discharging all interested parties, including Mr. Stewart, from any liability of wrongdoing, and an Ohio state court entered the judgment as a consent order. (CA JA 456). For a federal prosecution to then proceed based on the same conduct flies in the face of the federal obligation to give full faith and credit to the decision of the Ohio court. See 28 U.S.C. § 1738.

Because these issues were not before the Court in *Humana*, the writ should issue to clarify the scope of application of the McCarran-Ferguson Act in the context of a criminal RICO prosecution.

III.
THE COURT OF APPEALS PERMITTED THE INTRODUCTION OF EXTENSIVE EVIDENCE SUGGESTING FLIGHT, AND UPHELD THE TRIAL COURT'S JURY INSTRUCTION ON THE ISSUE, EVEN THOUGH NO FLIGHT OCCURRED

In a significant repudiation of the settled doctrine applicable in a clear majority of the federal courts of appeals, the Third Circuit approved the introduction of voluminous evidence under the rubric of "flight," even though it was undisputed that no actual flight oc-

curred.[19] In approving the district court's ruling on this evidentiary issue, the court of appeals substantially relaxed a constraint on such evidence, and jury instructions, that protects the rights of defendants who reside in other jurisdictions—namely, a settled prohibition on instructing the jury as to the inferences it may prudently draw from a defendant's "flight" where none actually occurred.

The prosecution's purported "flight" evidence likely played a substantial role in this case in light of the highly complex and confusing financial and accounting testimony that formed the bulk of the evidence the jury heard. Given the indisputable factual complexity of the case against Mr. Stewart (App. 3a), the risk is plain that the lay jury, unfamiliar with the arcana of statutory insurance accounting, simply seized on the unprobative, but more comprehensible, evidence suggesting "flight." Because this Court has

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[19] Mr. Stewart moved before trial to exclude the evidence the government had planned to introduce as representative of flight preparations. The trial court denied Mr. Stewart's motion *in limine*. (CA JA 1850) (App. 47a). The trial court then went on to instruct the jury:

> Any evidence that the defendant, Allen Stewart, planned to flee or conceal himself after learning of a criminal investigation of him is a circumstance that, if proven, can be considered by you, the jury, as showing consciousness of guilt on the part of the defendant. * * * Whether or not any evidence of preparations for flight or concealment on the part of the defendant causes you the jury to find a consciousness of guilt on his part and the significance, if any, of that consciousness of guilt is entirely up to you as the sole judges of the facts in this case.

(CA JA 3019–3020). The prosecution characterized its evidence as reflecting, not actual flight, but rather Mr. Stewart's "ma[king] plans to flee the country[.]" (Gov't CA Br. 63). All of what the government characterized as "flight" preparations, however, occurred a year and a half or more before Mr. Stewart's trial. Tellingly, even after a search of Mr. Stewart's residence by the FBI uncovered the evidence the government would later offer to suggest that he posed a flight risk, Mr. Stewart remained free on bail and traveled extensively, returning home on every occasion.

Although the issue was properly raised and briefed at length by both parties in the court of appeals, its opinion entirely ignored the issue, even neglecting to mention the issue in its enumeration of the claims it rejected without discussion. (App. 7a n.3). Nevertheless, its affirmance implicitly repudiated Mr. Stewart's argument that the standards applicable in the other Circuits should also have governed here.

never established a standard for the introduction of evidence concerning a defendant's putative "flight," and because the standard applied in the courts below resulted in the introduction of voluminous, but unprobative, testimony that should have been excluded, as in other jurisdictions, the writ should issue.

A. "Flight" Evidence Ordinarily Carries Little Probative Force.

Questions concerning the proper weight to be accorded "flight" evidence as supporting an inference of guilt, and the appropriate jury instructions, have persisted since this Court first addressed the subject more than a century ago. This Court held "that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen* v. *United States*, 164 U.S. 492, 499 (1896). Yet flight, standing alone, was at the same time held to be an inadequate basis to support an inference of guilt. See *Starr* v. *United States*, 164 U.S. 627, 631–632 (1897); *Alberty* v. *United States*, 162 U.S. 499, 508–511 (1896); *Hickory* v. *United States*, 160 U.S. 408, 416–417 (1896) ("acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt").

Discussing these and other authorities, this Court noted in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), that "we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." *Id.* at 483 n.10. This was true, the Court explained, because even innocent persons may give flight upon the appearance of law enforcement officers at a crime scene:

> [M]en who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."

Wong Sun, 371 U.S. at 483 n.10 (quoting *Alberty*, 162 U.S. at 511) (internal quotations omitted). See also *ibid.* (" 'After all, innocent people caught in a web of circumstances frequently become terror-

stricken.' ") (quoting *Cooper* v. *United States*, 218 F.2d 39, 41 (D.C. Cir. 1954)). Questions concerning the permissible inferences to be drawn from a defendant's flight have continued to arise in a variety of contexts, posing recurring difficulties in the administration of justice. See, *e.g.*, *Illinois* v. *Wardlow*, 119 S. Ct. 1573 (1999), granting cert. to *People* v. *Wardlow*, 701 N.E.2d 484 (Ill. 1998) (raising question whether suspect's flight from patrolling police officers may, without more, supply probable cause for a search) (argued Nov. 2, 1999).

B. The Courts Of Appeals Have Struggled To Establish A Standard For Admitting "Flight" Evidence But Have Settled On No Single Test.

In the years since *Wong Sun*, the courts of appeals have struggled, in the absence of a definitive standard, to devise a workable framework for determining when "flight" evidence should be permitted, or a jury instructed on drawing an inference of guilt from "flight" evidence. See *United States* v. *Williams*, 33 F.3d 876, 879 (7th Cir. 1994) ("[b]ecause the probative value of flight evidence is often slight, there is a danger that a flight instruction will isolate and give undue weight to such evidence"), cert. denied, 514 U.S. 1028 (1995).[20]

Several courts, but not the Third Circuit, have expressed support for the following four-factor test enunciated by the Fifth Circuit. Under this standard, the probative value of "flight" evidence depends upon

> the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to con-

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[20] Accord *United States* v. *Rodriguez*, 53 F.3d 1439, 1451 (7th Cir. 1995) ("flight instructions should be given with caution, if at all"); *United States* v. *Hernandez-Bermudez*, 857 F.2d 50, 54 (1st Cir. 1988) ("We urge, however, that courts exercise caution in admitting [flight] evidence. * * * [I]t is a species of evidence that should be viewed with caution; it should not be admitted mechanically, but rather district courts should always determine whether it serves a genuinely probative purpose that outweighs any tendency towards unfair prejudice."); *United States* v. *Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973) ("evidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence").

> sciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

United States v. *Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978). The same rule has been adopted by the Courts of Appeals for the Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits,[21] but not by the Third Circuit, and was not employed in this case. The Court of Appeals for the D.C. Circuit has suggested an analysis consistent with *Myers*, although it distills the four *Myers* inferences into two.[22]

Of the four *Myers* factors, commentators and courts alike have emphasized that the first inference—"from the defendant's behavior to flight"—must be scrutinized with particular care. This was, indeed, the very flaw that prompted the court's ruling in *Myers* itself. See *Myers*, 550 F.2d at 1050 ("[f]or a jury to find that Myers fled from federal agents . . . would require conjecture and speculation"). Professor Wigmore stressed that, when assessing evidence of an alleged flight, "it is *the act of the departure* that is itself evidential." 2 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 276, at 129 (Chadbourn rev. ed. 1979) (emphasis added).[23] Dis-

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[21] See *United States* v. *Dillon*, 870 F.2d 1125, 1127 (6th Cir. 1989) (collecting authorities); *United States* v. *Silverman*, 861 F.2d 571, 581 (9th Cir. 1988); *United States* v. *Martinez*, 681 F.2d 1248, 1255 (10th Cir. 1982); *United States* v. *Beahm*, 664 F.2d 414, 420 (4th Cir. 1981); *United States* v. *Peltier*, 585 F.2d 314, 323 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979); *United States* v. *Jackson*, 572 F.2d 636, 639 (7th Cir. 1978).

Of course, as a Fifth Circuit decision antedating the division of that court, *Myers* also governs in the Eleventh Circuit. See *United States* v. *Borders*, 693 F.2d 1318, 1325 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983).

[22] See *Miller* v. *United States*, 320 F.2d 767, 770 (D.C. Cir. 1963) ("Two factual assumptions underlie the legal relationship between flight and guilt: (1) that one who flees shortly after a criminal act is committed or when he is accused of committing it does so because he feels some guilt concerning that act; and (2) that one who feels some guilt concerning an act has committed that act.") (footnote omitted).

[23] Cf. *United States* v. *Dierling*, 131 F.3d 722, 731 (8th Cir. 1997) ("[t]he real question is what is in the mind of the person who flees and whether there is sufficient evidence to allow the inference that the flight was prompted by consciousness of guilt"), cert. denied, 118 S. Ct. 1379 (1998).

cussing the four-part *Myers* approach with approval, a leading treatise cautions that

> [t]he first step is the most crucial; great care must be taken that in defining the conduct as flight one does not resort to the circular reasoning that the person must have been fleeing because one believes that he or she is guilty.

22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5181, at 180 (Supp. 1999) (footnote omitted).[24] In jurisdictions that apply the *Myers* factors, decisions upholding the admissibility of flight evidence and the giving of appropriate jury instructions have uniformly involved actual flight by the defendant.[25]

This case well demonstrates the essential arbitrariness with which the lower courts, lacking a uniform standard, have responded to prosecutors' efforts to introduce flight evidence. Because the district court, and the Third Circuit, did not apply the

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[24] Another treatise usefully differentiates between actual observed flight from the immediate vicinity of law enforcement officers, and more attenuated or circumstantial evidence suggesting movement by the defendant:

> [I]t is not always clear that conduct really is flight. It is one thing when a person suddenly turns and runs or drives off in reckless haste when accosted by law enforcement officers who make their identity known and advise him he is under arrest. It is quite another thing when the evidence shows only that the accused was discovered in another jurisdiction some time after the crime, or that he had made plans to depart or was hard to find or late returning home, or reluctant to face police.

1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 85, at 422 (2d ed. 1994) (footnotes omitted).

[25] In addition to the cases collected *supra* note 21, all of which involved actual flight by the defendant, see also, *e.g.*, *United States* v. *Robinson*, 161 F.3d 463, 469 (7th Cir. 1998) ("attempting to elude police after [the crime] certainly constituted flight"), cert. denied, 119 S. Ct. 1482 (1999); *United States* v. *Barnes*, 140 F.3d 737, 738 (8th Cir. 1998) (defendant "fled from law enforcement officers"); *United States* v. *Lacey*, 86 F.3d 956, 973 (10th Cir.) ("[t]here is no dispute [defendant] fled on the eve of his first trial"), cert. denied, 519 U.S. 944 (1996); *United States* v. *Martinez*, 83 F.3d 371, 377 (11th Cir. 1996) ("he ran out of the house"), cert. denied, 519 U.S. 1133 (1997); *United States* v. *Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995) ("flight occurred immediately after commission of the crime").

four-part test of *Myers*, or articulate any alternative standard that was satisfied on this record, they permitted the prosecution to introduce days of highly inflammatory testimony on "flight," and then instructed the jury that they could permissibly infer Mr. Stewart's guilt from such evidence, even though it was undisputed that Mr. Stewart never fled or attempted to flee. Thus, the rationale permitting a jury to infer a defendant's guilt from the defendant's flight was extended, *sub silentio*, to allow the same inference even where the defendant never actually fled. The basis for the inference was ambiguous evidence the prosecution characterized as Mr. Stewart "ma[king] plans to flee the country[.]" (Gov't CA Br. 63).

Had Mr. Stewart resided in the Fifth Circuit, or one of the other jurisdictions in which *Myers* or a like standard governed, the district court would, of necessity, have granted his motion *in limine* and excluded the highly prejudicial testimony concerning his "planned flight." There, the first necessary *Myers* inference—"from the defendant's behavior to flight"—could not be satisfied where the defendant did not flee. We know of no cases, and the government cited none in the court below, holding such "planned flight" evidence admissible under the rubric of "flight" where the defendant never fled. Because the Third Circuit did not apply the standard applicable in other courts of appeals to this question, it upheld the district court's admission of extremely inflammatory evidence of little probative value and rendered a decision in conflict with its sister courts of appeals.

IV.
THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER A STATE-ISSUED LICENSE MAY BE CONSIDERED "PROPERTY" FOR PURPOSES OF THE FEDERAL MAIL AND WIRE FRAUD STATUTES

The mail and wire fraud statutes criminalize the making of mailings and wirings in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. §§ 1341, 1343. This Court has consistently interpreted this statutory language in conformity with its literal text, ruling that the mail and wire fraud laws reach only

schemes to deprive a victim of "money or property." See *McNally* v. *United States*, 483 U.S. 350, 360 (1987) (mail fraud statute is "limited in scope to the protection of property rights"); see also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987).[26]

The mail and wire fraud counts of the indictment accused Mr. Stewart of causing mailings and wirings to occur in furtherance of a scheme to "obtain, directly and indirectly, other money and property, *including licenses and the retention of licenses*[.]" (CA JA 1253) (emphasis added). Mr. Stewart moved to dismiss these counts of the indictment on the basis that "licenses and the retention of licenses" did not constitute "money or property" within the meaning of the mail and wire fraud statutes. The district court, however, denied the motion (App. 40a), declaring itself bound by a Third Circuit decision that has been rejected by several of the other courts of appeals. In so doing, the court placed itself on one side of a persistent disagreement among the courts of appeals concerning whether state-issued licenses, such as the insurance licenses at issue in this case, may be considered "property" for purposes of the federal mail and wire fraud statutes. In several reported cases, the federal courts of appeals have taken widely differing positions on the issue, and the matter is ripe for definitive resolution by this Court.[27]

The district court declared that the controlling rule in this case was supplied by *United States* v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990).[28] In *Martinez*, the court of ap-

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[26] After this Court's decision in *McNally*, Congress enacted 18 U.S.C. § 1346, which defined "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Section 1346, however, is not relevant to this case. Mr. Stewart was not charged under this section, and the prosecution did not proceed on a deprivation of honest services theory.

[27] Because the particular license involved in this case is a state-issued *insurance* license, this issue is to some extent necessarily intertwined with the preceding issue concerning the proper scope of the McCarran-Ferguson Act. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1960) ("the licensing of companies" is included within "the business of insurance" for purposes of the McCarran-Ferguson Act.).

[28] The district court's reasoning on the license issue was as follows:

peals ruled that a state-issued medical license was "property" that could be the subject of a scheme to defraud, and therefore be the basis for a federal mail fraud prosecution. *Martinez* reasoned that

> the government's interest here is not simply that of a regulator, but rather that of the dispenser of valuable property in which the licensee has constitutionally protected property interests and which the government may enjoin upon misuse. * * * [T]he [mail fraud] statute should be read as broadly protecting property interests, and we believe such a purpose is served in protecting the Commonwealth's interests as the holder of valuable medical licenses from fraudulent conduct depriving it of such property.

Martinez, 905 F.2d at 715.

Other Circuits disagree. For example, the recent decision in *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. de-

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> In Pennsylvania as in other states as well, the business of insurance, like the medical profession, is highly regulated. Without state authorization, one cannot open or operate an insurance company anymore [sic] than one can open or conduct a medical practice. An insurer in the Commonwealth must obtain a "certificate authorizing the company to commence business." Pa. Stat. Ann. tit. 40, § 405 (West 1992). * * *
>
> * * * By filing purportedly deceptive financial statements which appeared to show SNLIC as a financially healthy insurer, defendant schemed to retain the certificate authorizing SNLIC to conduct business in Pennsylvania and other states. While the certificate, like the medical license in *Martinez*, may take on value only in the hands of the recipient, it is the property of the Commonwealth nonetheless. *Martinez*, 905 F.2d at 713. If a recipient retains a certificate through fraud and deception, the Commonwealth and its people lose the right to have the certificate returned and to keep it from those who no longer are fairly entitled to it. *Id.*at 714.

(App. 44a–45a). Due in part to the existence of binding contrary authority within the Circuit, Mr. Stewart did not raise the property issue as a separate point of error in the limited space available for briefing in the court of appeals. Nevertheless, the question was squarely raised and passed on in the district court, and is in any event a matter of jurisdictional significance which may be raised at any time, given that the applicable statutes reach only offenses involving "money or property."

nied, 119 S. Ct. 1111 (1999), rejected the government's contention that a state-issued bail bond license could be deemed "property" for purposes of the federal mail fraud statute. The court reasoned:

> The recognition of a form of property in a license stems from the modern theory that property is a "bundle of rights." * * * These rights, however, may exist only in a particular set of hands. The right of due process prior to the revocation of a license, for example, exists only in the hands of the licensee. If this is property, it is not the state's property. * * * Even if such a license might be considered the licensee's property, from the government's perspective the license is "a promise not to interfere rather than a sliver of property."

Shotts, 145 F.3d at 1296–1297 (citations and footnotes omitted). *Shotts* expressly declined to follow the Third Circuit's decision in *Martinez*, which the district court here deemed dispositive. See *id.* at 1293. As *Shotts* recognized, *ibid.*, the question whether a state-issued license may be considered "property" for purposes of the mail and wire fraud statutes has deeply divided the courts of appeals, with a slight majority of those Circuits to have opined on the question agreeing with *Shotts* that such a license is not "property," and disagreeing with *Martinez*.[29]

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[29] For cases holding that a state-issued business license is not "property" for purposes of the federal mail and wire fraud statutes, in addition to *Shotts*, see *United States* v. *Schwartz*, 924 F.2d 410, 416–417 (2d Cir. 1991); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); *Toulabi* v. *United States*, 875 F.2d 122, 125–126 (7th Cir. 1989); *United States* v. *Kato*, 878 F.2d 267, 269 (9th Cir. 1989); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988); *United States* v. *Murphy*, 836 F.2d 248, 252–254 (6th Cir.), cert. denied, 488 U.S. 924 (1988). Cf. also *United States* v. *Adler*, 186 F.3d 574, 577 (4th Cir. 1999) ("we have applied the common sense notion that property is anything in which one has a 'right that could be assigned, traded, bought, and otherwise disposed of' ") (citation omitted).

For cases taking the contrary view, in addition to *Martinez*, see *United States* v. *Salvatore*, 110 F.3d 1131, 1140 (5th Cir.), cert. denied, 522 U.S. 981 (1997); *United States* v. *Sacco*, 923 F.2d 970, 973–976 (2d Cir.) (recognizing and upholding binding Circuit precedent that licenses were not property, but expressing the contrary views of two members of the panel), cert. denied, 500 U.S. 919

Given the deep and persistent divisions among the courts of appeals on this issue concerning an element of the frequently prosecuted crimes of mail and wire fraud, review by this Court manifestly is warranted to resolve this recurring issue, which is of substantial importance both to the administration of criminal justice and to civil cases relying in part on allegations of mail or wire fraud. Accordingly, the writ should issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Kenneth I. Trujillo
Ira Neil Richards
TRUJILLO RODRIGUEZ
& RICHARDS, LLC
The Penthouse
226 West Rittenhouse Square
Philadelphia, PA 19103
(215) 731-9004

W. Neil Eggleston
Counsel of Record
Timothy K. Armstrong
Jeanne-Marie S. Raymond
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
Allen W. Stewart

NOVEMBER 1999

(1991); *United States* v. *Bucuvalas*, 970 F.2d 937, 942–945 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993).

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1260

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1302

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1541

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1716

UNITED STATES OF AMERICA,
Appellant in 98-1860

v.

ALLEN W. STEWART

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1968

Nos. 98-1260, 98-1302, 98-1541, 98-1716, 98-1860, and 98-1968

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 16, 1999, Filed

W. Neil Eggleston (argued), Richard A. Ripley, Timothy K. Armstrong, Howrey & Simon, Washington, DC. Kenneth I. Trujillo, Ira Neil Richards, Trujillo Rodriguez & Richards, LLC, Philadelphia, PA, Attorneys for Appellant-Cross-Appellee Allen W. Stewart.

Michael R. Stiles, United States Attorney, Walter S. Batty, Jr., Assistant United States Attorney, Chief of Appeals, Linda Dale Hoffa (argued), Assistant United States Attorney, Michael V. Rasmussen (argued), Special Assistant United States Attorney, Philadelphia, PA, Attorneys for Appellee-Cross-Appellant United States of America.

Ross S. Myers, National Association of Insurance Commissioners, Kansas City, MO, Attorney for Amicus Curiae National Association of Insurance Commissioners.

BEFORE: GREENBERG and ALITO, Circuit Judges, and DOWD,* District Judge.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. *INTRODUCTION*

On December 17, 1997, a district court jury convicted Allen W. Stewart, formerly a partner in a Philadelphia law firm, of 135 counts of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, money laundering, 18 U.S.C. § 1957, and racketeering, 18 U.S.C. § 1962(c). On August 12, 1998, the court sentenced Stewart to 180 months in prison, to be followed by three years of supervised release and required him to forfeit substantially all of his known assets and to pay $60 million in restitution.

Stewart appeals from the judgment of conviction and sentence, raising many legal issues as to why he is entitled to a new trial or

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* Honorable David D. Dowd, Jr., Senior Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

an acquittal. Stewart also challenges the district court's forfeiture of his personal Merrill Lynch account ("the Account") as a substitute asset under 18 U.S.C. § 982(b)(1). The government cross-appeals the district court's ruling that the Account was not directly forfeitable under 18 U.S.C. § 982(a)(1) as property "involved in" or "traceable to" Stewart's money laundering activities. For the reasons that follow, we will affirm Stewart's conviction and sentence and the other orders from which he appeals. We, however, will reverse on the government's cross-appeal and thus will modify the district court's forfeiture order so that the Account is forfeited directly rather than as a substitute asset. As modified, we will affirm the forfeiture order.

II. *BACKGROUND*

A. Factual History

This case involves a very complicated series of fraudulent transactions that we only summarize. Stewart's activities revolved around various insurance companies and shell corporations he created to facilitate his fraudulent transactions. Stewart's two main vehicles for his criminal activities were Summit National Life Insurance Company ("Summit"), formerly an Ohio corporation that moved to Pennsylvania, and Equitable Benefit Life Insurance Company ("EBL"), a Pennsylvania corporation. In 1994, the Pennsylvania Department of Insurance ("Department") took control of these companies because they were insolvent. Stewart had sold these companies for a nominal amount immediately before their insolvency was revealed. During his ownership, each company reported that its assets exceeded its liabilities. These surpluses were fraudulent, however, as the companies inflated their assets with unsecured worthless IOUs and accounting acrobatics aimed at concealing the huge deficits that Stewart created by his leveraged purchase of Summit and by his other conduct.

The fraudulent transactions began in 1988 when Stewart, who already owned EBL through a holding company, bought Summit. Stewart originally became involved in the Summit purchase as Richard Fanslow's attorney in Fanslow's attempt to acquire Summit. To facilitate the acquisition of Summit, Fanslow created a shell corporation to buy Summit for $52 million, subject to post-closing adjustments. When Fanslow's bid failed because of the disapproval of Ohio's insurance regulators, Stewart stepped in as

the purchaser. When Stewart took over, he needed approximately $62 million to buy out Fanslow and purchase Summit.

In preparing to purchase Summit, Stewart formed a Pennsylvania partnership called Summit Company in which he assigned the interests as follows: 9% to himself, 9% to his wife, 34% to a stepson, 24% to a trust he had created for another stepson, and 24% to a trust he had created for his son. Despite his 9% ownership, Stewart exercised actual control over the partnership. According to the purchase agreement between Stewart and Fanslow, Stewart was to pay Fanslow $473,499 in cash, deliver a $6.4 million promissory note to him and pay a large portion of Fanslow's deposit to acquire Summit. On October 6, 1988, Stewart acquired Summit with a $47.7 million bank loan and a $2.7 million contribution from EBL.

Stewart then needed approximately $62 million to pay the bank, Fanslow, and other expenses, as well as to secure the promissory note. Summit's $31 million capital and surplus could not cover this amount, so Stewart devised a number of schemes to pay off his debts without showing a reduction in Summit's assets.

First, Summit sent more than $70 million to EBL. In turn, EBL passed $62 million through a handful of Stewart's shell corporations, which eventually paid the bank loan and Fanslow. In return for the $62 million, these shell corporations generated a series of unsecured IOUs to EBL and Summit.

Stewart made these transfers pursuant to a reinsurance agreement between EBL and Summit. In exchange for the $70 million it received from Summit, EBL agreed to pay future claims on a portion of Summit's policies. Summit, in turn, recorded a reduction in liabilities corresponding to its reduction in assets when it gave EBL the $70 million. EBL recorded a corresponding increase in assets and liabilities. However, Summit continued to make the payments on claims for which EBL supposedly assumed responsibility. Stewart continued hiding Summit's missing assets by double-pledging the collateral used to secure the Fanslow promissory note and through further fraudulent transactions whereby Stewart would circulate money taken from Summit through his other corporations before returning it to Summit as payments on the IOUs. Summit also engaged in a sham reinsurance agreement with an unrelated insurance company, similar to the fraudulent agreement it

had entered into with EBL, and purchased another insurance company in 1992, to which it assigned all of EBL's profitable business.

Stewart did not inform the Ohio insurance regulators of his acquisition of Summit. When they learned of it, the regulators disapproved and ordered the transaction unwound. Stewart then sued the Ohio Commissioner of Insurance following which the parties reached a settlement in which Summit agreed to sell its Ohio policies to another insurer and move out of Ohio.

In addition to his fraudulent efforts to conceal the deficits in his insurance companies, Stewart also began stealing funds from Summit for his personal use. Pursuant to its agreement with the Ohio regulators, Summit sold 25% of its policies to an unrelated insurance company, Continental Western, and its parent, Beneficial Life Insurance Company ("Beneficial"), in exchange for an annual return of 90% of the profits from these policies. In January 1992, Stewart caused Summit to assign, without compensation, this agreement to another shell corporation he controlled. He used the payments from Beneficial to help purchase a $1.6 million ocean-front house in Del Mar, California, to pay for improvements to the house and furnish it with antiques, to pay a $100,000 annual salary to his girlfriend, and to pay $20,000 in "professional fees" to his son. It also appears that Stewart "borrowed" $2 million from Summit through a similar scheme to pay for renovations to his wife's house in Radnor, Pennsylvania.

Stewart ultimately concluded that he should sell Summit and EBL before anyone would have the opportunity to detect his fraudulent activities. In September 1992, he convinced Larry Fondren, an interested buyer, to sign a letter of intent to purchase the companies for approximately $8 million. When Fondren tried to examine their books his due diligence was obstructed, and thus he attempted to withdraw from the purchase. Stewart then sought another buyer but that buyer's accountant discovered that Summit and EBL were insolvent. Meanwhile, Stewart had brought suit against Fondren and thereby forced Fondren to go through with the purchase on the condition that he would not make a substantial payment for the companies.

After he took over the companies, Fondren's fears were realized when he discovered that both were insolvent. He contacted the Department, which placed the companies into rehabilitation in

1994. The Department traced the companies' insolvency to Stewart's ownership period.

As a result of the companies' insolvencies, over 9,000 life insurance policies were devalued, other policies became worthless, and other insurance companies that belonged to the same Guarantee Association were forced to take over certain liabilities of Summit and EBL. The government established at sentencing that the losses from the companies' insolvencies exceeded $80 million, and that Stewart was personally responsible for $60.1 million of this amount.

Through Stewart's criminal activities, he accumulated—aside from amounts not relevant to this discussion—$3 million which he deposited into his Account at Merrill Lynch on or about August 30, 1996. The Account previously contained $160,000, which was, as far as the government could ascertain, legitimate money not related to Stewart's criminal activity. The government obtained a pretrial restraint against the withdrawal of the entire Account. Thereafter, the only withdrawal from the Account was $600,000, released pursuant to a July 3, 1997 agreement between the government and Stewart so that he could retain trial attorneys of his choice. At the time of the withdrawal, Stewart and the government agreed that the $600,000 included the legitimate $160,000. Ultimately, the court ordered this Account forfeited as a substitute asset.

B. Procedural History

When Stewart's scheme collapsed, a grand jury indicted him. During the ensuing jury trial, the government sought to forfeit directly Stewart's personal Account at Merrill Lynch under the RICO forfeiture statute, 18 U.S.C. § 1963. In its special forfeiture verdict, however, the jury declined to forfeit the Account as property acquired or maintained as a result of Stewart's RICO violations. Following the trial the government nevertheless claimed that the Account should be forfeited as a substitute asset under 18 U.S.C. § 982(b)(1), a provision in the criminal money laundering forfeiture statute.[1] The government later changed its position and requested that the funds in the Account be forfeited directly under 18 U.S.C. § 982(a)(1) as property "involved in" or "traceable to" Stewart's money laundering offenses.

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[1] The substitute asset provision in 21 U.S.C. § 853 is incorporated into 18 U.S.C. § 982(b)(1). *See id.* (incorporating subsection (p) of 21 U.S.C. § 853).

The district court at Stewart's sentencing hearing on August 12, 1998, considered the government's request to forfeit the Account directly. During the hearing, the government traced $3 million of laundered funds to the Account. These funds represented the same money that, according to the jury's verdict on Count 153 of the indictment, Stewart had withdrawn illegally from the Merrill Lynch account of Tartan Management Corporation, a company Stewart controlled. The jury specifically forfeited this $3 million in Count 157 under 18 U.S.C. § 982, the money laundering forfeiture provision. Despite the government's success in tracing the funds to the Account, the district court concluded that *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), precluded the direct forfeiture of the $3 million because the money had been commingled with the $160,000 of untainted funds already in the Account.

In an October 6, 1998 order, the court then considered the government's alternate request to forfeit the Account as a substitute asset. The court concluded that the government had satisfied the money laundering substitute asset provision because it demonstrated that qualified property, the $3 million Stewart withdrew from the Tartan Management account, had been "commingled with other property which cannot be divided without difficulty." 18 U.S.C. § 982(b)(1) (incorporating 21 U.S.C. § 853(p)(5)). It therefore granted the government's motion.

III. *DISCUSSION*

Turning to the merits of this appeal, we first discuss Stewart's challenges to his conviction and then consider the challenges to the district court's October 6, 1998 forfeiture order.[2] With respect to the purported trial errors, we address only those issues Stewart raised at oral argument, as we find the myriad other contentions contained in Stewart's brief to be clearly without merit.[3]

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[2] The district court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment of conviction and its October 1998 forfeiture order as well as the other orders on appeal.

[3] Accordingly, we reject without discussion Stewart's arguments that the district court violated his right of confrontation by prohibiting recross-examination, the RICO count as set forth in the indictment was defective on its face, the district court constructively amended the indictment's charges on RICO enterprise, the evidence was insufficient to establish that Stewart mailed the fraudulent communications for his mail fraud convictions, the evidence was insufficient to establish a scheme to defraud, the indictment failed to charge an essential element of the

A. Did the district court violate Stewart's right to the counsel of his choice by disqualifying his "expert" attorneys?

Stewart first argues that the district court's disqualification of certain of his attorneys deprived him of his Sixth Amendment right to counsel. After conducting a hearing, the district court, on September 24, 1997, granted the government's motion to disqualify the law firm of Christie, Pabarue, Mortensen and Young ("Christie Pabarue") from representing Stewart in the criminal prosecution. *See United States v. Stewart*, No. 96-583, 1997 WL 611594, at *4 (E.D. Pa. Sept. 24, 1997). However, Robert E. Welsh, Jr., who was not from that firm, had represented Stewart since the middle of 1996, months before the grand jury indicted him on December 4, 1996, and the court did not disqualify Welsh. Although Christie Pabarue had been working "informally" with Welsh during the same period, the firm had not entered its appearance as co-counsel until July 31, 1997. *Id.* at *1.

The conflict leading to Christie Pabarue's disqualification arose because the firm also had been representing Stewart, Jeanne Fletcher, June O'Brien, Geoffrey Stewart, and Paul Tamaccio in a civil RICO action in the district court brought by the Pennsylvania Insurance Commissioner parallel to this case. Fletcher, O'Brien, Geoffrey Stewart, and Tamaccio had agreed with the government to testify for it at Stewart's criminal trial. These four persons had various relationships with Stewart that we describe below. On April 10, 1997, the district court in the civil action denied the Commissioner's motion to disqualify Christie Pabarue from representing 14 co-defendants, including Stewart and these four individuals. *See Kaiser v. Stewart*, 1997 WL 186329, at *5 (E.D. Pa Apr. 10, 1997). However, the firm's representation of Stewart in the criminal trial was more problematic to the district court. *See United States v. Stewart*, 1997 WL 611594, at *1.

The court recognized that the government had granted immunity to Fletcher, O'Brien, Geoffrey Stewart, and Tamaccio, and

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offense of money laundering by not mentioning a "financial institution," the district court constructively amended the indictment by broadening the potential basis of conviction for the money laundering counts, there was insufficient evidence to establish venue in the Eastern District of Pennsylvania, there was insufficient evidence to establish that the fraudulent transactions affected interstate commerce, and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015, barred the prosecution.

characterized their testimony as "significant" to the prosecution. *Id.* At the hearing on the government's disqualification motion in this case, Stewart and the four witnesses each stated that he or she waived any conflicts, agreed to the disclosure of privileged information, and consented to allowing Christie Pabarue to serve as Stewart's attorney. *Id.* Yet, the district court determined that the firm's defending of Stewart was "directly adverse" to its representation of the four individuals, and thus placed the Christie Pabarue attorneys in the "unenviable position of cross-examining their own clients with the help of attorney-client communications." *Id.* at *3.

Moreover, the court doubted that the four individuals comprehended the ramifications of adverse representation and questioned whether their waivers were truly voluntary inasmuch as each of the four was tied intimately to Stewart: Fletcher was still an officer of an operating insurance company Stewart owned and controlled; O'Brien was Stewart's live-in girlfriend; Geoffrey Stewart was his son; and Tamaccio was his step-son. *Id.* at *3–4. Furthermore, Stewart was paying both O'Brien's civil and criminal legal fees, and his company was paying Fletcher's fees. *Id.* at *4. The court also recognized that it had an "independent responsibility to uphold the ethical precepts of the legal profession as well as the public interest in the integrity of the judicial process." *Id.* Finally, the court stated that Welsh was "able and experienced" and that "no evidence or contention has been presented that [Christie Pabarue's] absence [would] prejudice Allen Stewart's right to a fair trial." *Id.*

We review the district court's order in two stages. First, we exercise plenary review to determine whether the district court's disqualification was arbitrary—"the product of a failure to balance proper considerations of judicial administration against the right to counsel." *Voigt*, 89 F.3d at 1074. If we find that the district court's decision was not arbitrary, we then determine whether the court abused its discretion in disqualifying the attorneys. *See id.*

Stewart seems to attack the district court's disqualification decision as arbitrary, although he may be confusing the two aspects of our dual prong analysis. Stewart equates an adverse decision with an arbitrary one, and puts much stock in the fact that the court allowed Christie Pabarue to represent all of the defendants, including Stewart and the four individuals, in the civil RICO case. We long have recognized, however, that "as long as the court makes a 'reasoned determination on the basis of a fully prepared

record,' its decision will not be deemed arbitrary." *Id.* at 1075 (quoting *Fuller v. Diesslin*, 868 F.2d 604, 609 n.4 (3d Cir. 1989)). In this case, the court held a hearing and properly balanced the factors for and against disqualifying Christie Pabarue. Thus, we cannot say that its decision was arbitrary, as we have defined that term in the context here, and we confine our review to determining whether the district court abused its discretion in making this decision.

Considering Stewart's arguments in light of our deferential standard of review, we find that the district court did not abuse its discretion in disqualifying Christie Pabarue. Indeed, even if we were to review the court's decision *de novo*, we still would uphold its determination, as we have come to the same conclusion as did the district court regarding the propriety of Christie Pabarue's representation of Stewart at the criminal trial.

Stewart claims that the district court erred because only a few months earlier in the civil RICO case it denied a "substantively indistinguishable motion." Br. at 24. However, Stewart mischaracterizes the situation, for while the motions sought similar relief, the circumstances surrounding their consideration were quite different. When the district court declined to disqualify Christie Pabarue in the civil RICO case, the firm was representing all the defendants in that suit but did not claim that it represented Stewart in the criminal action. *See Kaiser v. Stewart*, 1997 WL 186329, at *1 n.1 ("Stewart has separate counsel in the criminal action."). Here, however, Stewart was the defendant in a criminal prosecution, and his civil co-defendants, figuratively at least, were sitting on the other side of the courtroom because they had agreed to testify against him under grants of immunity. Thus, Christie Pabarue's multiple representations in the civil RICO case created a conflict of interest with its representation of Stewart in his criminal trial.

In disqualifying Christie Pabarue in the criminal case, the district court recognized that the firm "informally" had been working with Welsh on Stewart's defense since "mid-1996." *United States v. Stewart*, 1997 WL 611594, at *1. Yet it is questionable that the district court in the civil RICO matter was aware of this fact when it denied the Commissioner's disqualification motion. Moreover, we believe that if it had known of the firm's "informal" representation of Stewart in the criminal case, the court might have viewed

its representation of him in the civil case as much more problematic.

We recognize but reject Stewart's argument that there was no "*direct* conflict of any kind" because the four individuals were not criminal defendants. Br. at 26 (emphasis in original). While it is true that the typical scenario where disqualification becomes necessary entails an attorney's attempt to represent multiple defendants in the same prosecution, we have recognized that conflicts arise where a "defendant seeks to waive his right to conflict-free representation in circumstances in which the counsel of his choice may have divided loyalties due to concurrent or *prior* representation of another client who is a co-defendant, a co-conspirator, *or a government witness*." *United States v. Moscony*, 927 F.2d 742, 749 (3d Cir. 1991) (emphasis added).

Because the Christie Pabarue attorneys would have been part of a team of attorneys required to cross-examine the four individuals testifying for the government, Stewart's right to effective counsel could have been compromised by the divided loyalties of his own attorney: "Conflicts of interest arise whenever an attorney's loyalties are divided, and an attorney who cross-examines former clients inherently encounters divided loyalties." *Id.* at 750 (citations omitted). Thus, Stewart is mistaken in arguing that Christie Pabarue's multiple representations did not pose a serious potential for conflicts of interest simply because the four individuals were not co-defendants in the criminal trial.

Similarly, we reject Stewart's contention that the district court's "theory as to why Mr. Stewart's interests diverged from the four witnesses' interests collapses under scrutiny." Br. at 27. The district court stated that it could be an "obvious" defense theory at trial to focus blame for wrongdoing on the four individuals. *United States v. Stewart*, 1997 WL 611594, at *3. Stewart claims that such a theory was "*directly contrary to the publicly declared strategy of defense that counsel had already adopted*." Br. at 27 (emphasis in original). The defense's "publicly declared strategy" was to assert that the allegedly fraudulent transactions were legal because Stewart had received the approval from the proper regulatory agencies for them. *Id.*

We recognize that, as the Supreme Court noted in *Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 1700, 100 L. Ed. 2d 140 (1988), there is a presumption in favor of a defendant's

choice of attorneys. But the Supreme Court went on to explain that:

> that presumption may be overcome *not only by a demonstration of actual conflict but by a showing of a serious potential for conflict*. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.

Id., 108 S. Ct. at 1700 (emphasis added).

Moreover, notwithstanding an attorney's pretrial assurances otherwise, a defendant's trial strategy is not fixed. Thus, if an attorney has been unsuccessful in bringing out the necessary points in support of a contemplated defense, the attorney may change his strategy to provide the defendant with the best possible defense. Accordingly, the district court could not accept Stewart's assurances that he would not pursue an alternate strategy at trial. In fact, by so doing, the court would have been opening the door for a manufactured mistrial or a possible ineffective assistance of counsel claim on appeal. We emphasize that this was a complex trial and that during the course of a case of this nature a defendant well might change his strategy. In this regard, we point out that a district court will not limit a defendant at trial to the position the defendant stated in pretrial public statements, which a court will not regard as a defensive bill of particulars.

Furthermore, we find equally unavailing Stewart's argument that the district court abused its discretion in disqualifying Christie Pabarue in the face of his and the other four individuals' waiver of any conflicts. Stewart's argument does not take into account the court's obligation to examine the validity of a waiver. After all, we have held that "such a waiver, . . . does not necessarily resolve the matter, for the trial court has an institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver." *Moscony*, 927 F.2d at 749. The tension between protecting the institutional legitimacy of judicial proceedings, which includes a concern to shield a defendant from having his defense compromised by an attorney with divided loyalties, and allowing a defendant to be represented by the attorney of his choice, creates the disqualification issue. Thus, a district court has discretion to disqualify counsel if a

potential conflict exists, *see Wheat*, 486 U.S. at 164, 108 S. Ct. at 1700, even where the represented parties have waived the conflict.

Moreover, we agree with the district court's conclusion that the four individuals did not "fully comprehend[ ] the ramifications flowing from joint representation" and we share the court's doubt that the waivers were "truly voluntary." *United States v. Stewart*, 1997 WL 611594, at *3–4. As the district court noted, even with its vast experience in presiding over criminal trials, it cannot foresee what ramifications can flow from multiple representations. Thus, the court had good reason to doubt "that anyone could be sufficiently prescient to foresee the exact path this case [would] take either in the time remaining before trial or at trial." *Id.* at *3. Further, the four individuals had personal relationships with Stewart and could have felt that by waiving the conflicts and their privileges they somehow were lessening the damage that their adverse testimony would cause to Stewart. When we also consider that Stewart either personally or through his insurance company was paying the legal fees of two of these individuals, we see no reason to upset the district court's judgment on this matter.

Finally, we reject Stewart's claim that the government manufactured the conflict to disadvantage him at trial. Br. at 28–29. Such a claim flies in the face of reality inasmuch as the government agreed to immunity for all four individuals and thus to that extent lessened the conflict. In any event, the conflict was real. Accordingly, we will affirm the district court's order disqualifying Christie Pabarue from representing Stewart in this case.

B. Did the indictment omit an element of "mail fraud"?

Stewart argues that we must reverse the mail fraud convictions—and consequently the money laundering and RICO convictions that relied upon the mail fraud counts as predicate acts—because the indictment and jury instructions omitted the "knowing" element of causing a fraudulent communication to be mailed. Br. at 49.[4] He claims that a violation of 18 U.S.C. § 1341 requires a showing that the defendant "mails or *knowingly* causes to be mailed an article in furtherance of a scheme to defraud." *Id.* According to this argument, the indictment's language drops this knowing element. The indictment states:

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[4] Because this argument raises a legal question of the elements of a criminal offense, we exercise plenary review. *See United States v. Mosley*, 126 F.3d 200, 201 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998).

> 54. On or about each of the dates listed below, in the Eastern District of Pennsylvania and elsewhere, the defendant,
>
> ALLEN W. STEWART
>
> for the purpose of executing the scheme and artifice described above and attempting to do so, *caused to be placed in an authorized depository for mail matter* the documents described below to be sent by the United States Postal Service, any one of which placements constitutes the commission of Act One. . . .

Joint app. at 1240–41 (emphasis added).

The mail fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, *places in any post office or authorized depository for mail matter*, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or takes or receives therefrom, any such matter or thing, or *knowingly causes to be delivered by mail . . . according to the direction thereon*, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined . . . or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added).

We hold that inasmuch as 18 U.S.C. § 1341 does not require the "knowing" placing of a communication in an authorized depository for mail matter, the indictment correctly charged Stewart with causing communications to be placed in an authorized depository for mail matter. Use of the term "caused to be placed" in the indictment referred to the fact that a defendant can be held responsible for actions that he orders or directs another to perform. *See* 18 U.S.C. § 2(b). The jury was instructed on this theory of criminal responsibility. Joint app. at 3018–19. Conversely, Con-

gress added the reference to "knowingly causes to be delivered" in section 1341 to ensure that a defendant would not be held responsible for fraudulent mailings where he unknowingly processes a piece of mail or otherwise is involved unwittingly with fostering the material's delivery. Because of this distinction, we hold that the indictment properly charged Stewart with mail fraud.

C. Was Stewart entitled to an "entrapment by estoppel" instruction?

Stewart argues that the district court erred in refusing to charge the jury on his defense theory of "entrapment by estoppel"—that he had made the allegedly illegal transactions in reliance on the "categorical approval of all necessary state regulatory bodies after full investigation and disclosure." Br. at 56–57. Stewart argues that under *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 887, 99 L. Ed. 2d 54 (1988), and *United States v. Mosley*, 126 F.3d 200, 203 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998), the district court's refusal to charge the jury on a recognized defense, for which there exists evidence for a reasonable jury to find in the defendant's favor, was reversible error.

We review the district court's refusal to instruct the jury on a defense theory *de novo* in light of the fact that Stewart objected to the court's refusal to give the charge. *See Government of the Virgin Islands v. Joseph*, 765 F.2d 394, 398 (3d Cir. 1985). The entrapment by estoppel defense applies where the defendant has established by a preponderance of the evidence that:

> (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.

United States v. West Indies Transp., Inc., 37 V.I. 579, 127 F.3d 299, 313 (3d Cir. 1997).

Stewart argues that he was entitled to have the district court instruct the jury on the defense based upon his interactions with the Ohio insurance regulators in purchasing Summit. The Ohio regulators initially had ordered the transaction unwound, but allowed

the transaction to go through after being sued by Stewart. Pursuant to a Settlement Agreement, Ohio allowed the sale on the condition that Stewart move Summit out of Ohio and sell all of its Ohio policies to other Ohio insurance companies. Stewart argues that this Settlement Agreement

> represented (1) the statement of a government official (the Ohio Superintendent of Insurance), (2) to defendant that certain conduct (the purchase of SNLIC-Ohio as proposed, together with the cession of the Ohio Business and relocation to Pennsylvania by merger with Parkway) was lawful, and (3) the defendant relied on the Settlement Agreement, (4) with such reliance being in good faith and reasonable in light of the Superintendent's authority, the points of law at issue, and the substance of the statements in the Settlement Agreement.

Br. at 59.

We find that the evidence cannot establish an entrapment by estoppel defense and thus the court properly refused to charge on the defense. The Ohio Superintendent never stated to Stewart that the criminal conduct for which the jury later convicted him was legal. While Ohio ultimately consented to Stewart's purchase of Summit, it did not, and could not, approve of his concealment of Summit's and EBL's huge deficits, and his stealing funds from both companies. Accordingly, there is simply no reasonable way that the record can be read to support a conclusion that the Ohio regulators' highly conditional consent to Stewart's acquisition of Summit amounted to a statement that Stewart's conduct constituting mail fraud, wire fraud, money laundering, and RICO violations was legal.

Furthermore, the Ohio regulators did not even make a clear statement approving of Stewart's acquisition of Summit. Rather, the Settlement Agreement provides that "nothing contained herein shall constitute or be construed as an admission by any party hereto of the truth or validity of any of the claims or contentions asserted by either party in any of the Administrative Proceedings or the Court Proceedings, or the ratification of any past conduct by either party." Joint app. at 463. Thus, the parties expressly agreed that neither could construe the agreement as ratifying any past

conduct. The agreement also demonstrates that Ohio's regulators, although stopping short of affirmatively accusing Stewart of illegal activity, did not want him conducting business in Ohio. As conditions of the Settlement Agreement, Ohio forced Summit to sell all of its Ohio policies, move to a different state, and surrender its authority to do business in Ohio. *See id.* at 457–58. No reasonable person can construe an agreement in which the regulators essentially ushered Stewart out of Ohio as approving of Stewart's conduct. Accordingly, for this reason as well, we hold that the Ohio regulators' statements cannot reasonably support a conclusion that the regulators condoned Stewart's illegal activities.

At bottom, Stewart's case is more like *West Indies*, 37 V.I. 579, 127 F.3d 299, than *United States v. Pennsylvania Industrial Chemical Corp.*, 461 F.2d 468 (3d Cir. 1972), *modified and remanded*, 411 U.S. 655, 93 S. Ct. 1804, 36 L. Ed. 2d 567 (1973), the only case in which we have found that the evidence supported an entrapment by estoppel defense. In *Pennsylvania Industrial* we reversed the defendant's conviction for discharging pollution in violation of the Rivers and Harbors Act, 33 U.S.C. § 407, because the district court refused to charge the jury on the entrapment by estoppel defense or to allow the defendant to present evidence that Army regulations and the government's long-term interpretation of the statute authorized its allegedly criminal acts. 461 F.2d at 479.

In *West Indies*, however, we affirmed the defendants' convictions despite the district court's refusal to instruct the jury on the entrapment by estoppel defense. 127 F.3d at 313–14. In that case, the defendants argued that their convictions for visa fraud could not stand over an estoppel defense because they had informed the INS fully of their conduct of which it then approved. *Id.* at 313. The defendants also argued that estoppel principles barred their convictions for illegal dumping inasmuch as the Coast Guard placed a placard stating that some types of "nonplastic trash" may be discharged at sea if the vessel is at least 12 nautical miles from shore. *Id.* at 314. We rejected both of these arguments on the grounds that the government never approved of the specific criminal activity. The INS was not apprised of the entire situation when granting the visas in question, while the Coast Guard's placard did not claim to set out all of the dumping restrictions. *Id.* at 313–14.

The circumstances here are similar. The Ohio regulators did not approve of Stewart's criminal conduct described in the counts

on which the jury convicted him. Thus, we hold that the district court did not err in refusing to instruct the jury on the entrapment by estoppel defense because Stewart did not present sufficient evidence to permit a jury to conclude that he established the defense by a preponderance of the evidence. *See, e.g., United States v. Weitzenhoff*, 35 F.3d 1275, 1290–91 (9th Cir. 1993) (refusal to instruct jury on entrapment by estoppel defense upheld); *United States v. Billue*, 994 F.2d 1562, 1568–69 (11th Cir. 1993) (same); *United States v. LaChapelle*, 969 F.2d 632, 637–38 (8th Cir. 1992) (same); *United States v. Hurst*, 951 F.2d 1490, 1499 (6th Cir. 1991) (same).[5]

D. Did the district court err in giving a "willful blindness" instruction?

Stewart contends that although the district court instructed the jury that it could convict him on the mail and wire fraud counts based on "willful blindness," the government proceeded at trial on an actual-knowledge theory. He argues that this charge constituted reversible error because it lowered the government's burden of proving intent. He also argues that the court's instruction was flawed "as a matter of law" because the court omitted the "high probability requirement" that *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985), required. Because Stewart objected to this instruction at trial, we review the instruction *de novo*. *See Joseph*, 765 F.2d at 398.

We have upheld a district court's willful blindness instruction where the charge made "clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *Caminos*, 770 F.2d at 365. In other words, a willful blindness charge does not lower the government's burden of proving intent as long as it "emphasizes the necessity of proving a subjective awareness." *Id.* at 366. If the charge satisfies this standard, and is supported by sufficient evidence, it is not inconsistent for a court to charge a jury on both an actual knowledge theory and

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[5] Although we do not reach the issue, we are doubtful that a defendant can claim an entrapment by estoppel defense when, as Stewart contends was the case here, the government official is a state official who approves of the criminal conduct on state law grounds and the defendant is accused of violating federal law. *See Hurst*, 951 F.2d at 1499–50; *United States v. Etheridge*, 932 F.2d 318, 320–21 (4th Cir. 1991); *United States v. Bruscantini*, 761 F.2d 640, 641–42 (11th Cir. 1985).

a willful blindness theory. *See United States v. Stuart*, 22 F.3d 76, 81 (3d Cir.1994). Moreover, contrary to Stewart's second assertion, we do not require a court's charge to contain specific language that a defendant must have "a subjective awareness of a high probability that something is amiss." *See id.* at 81 (upholding the following instruction: "The government may prove that a person acted knowingly by proving beyond a reasonable doubt that that person deliberately closed his eyes to what otherwise would have been obvious to him. One cannot avoid responsibility for an offense by deliberately ignoring what is obvious.").

Momentarily putting aside the issue of the sufficiency of the evidence that would justify instructing the jury on willful blindness, we consider Stewart's claim that the district court's instruction on willful blindness was erroneous as a matter of law. The full instruction reads:

> The government can meet its burden of proving fraudulent intent not only by showing that a defendant knowingly lied but also by proving beyond a reasonable doubt that he acted with deliberate disregard of whether the statements were true or false or with a conscious purpose to avoid learning the truth.
>
> Stated another way, a defendant's knowledge of a fact may be inferred from a deliberate or intentional ignorance of or willful blindness to the existence of that fact. It is entirely up to you as to whether you find any deliberate closing of the eyes and as to the inferences to be drawn from any such evidence.
>
> This guilty knowledge, however, cannot be established by demonstrating that the defendant was merely negligent or foolish. These legal concepts concerning proof of fraudulent intent apply to all the counts of the superseding indictment which allege fraud as an element.

Joint app. at 3031–32. Comparing this instruction to the one we approved in *Stuart*, we conclude that the district court's charge was sufficient to guard against the jury convicting Stewart under an

objective standard of willful blindness. In fact, we consider the court's charge here more clearly to emphasize the distinction between objectively foolish behavior and deliberate or intentional ignorance than the Stuart charge.

Moreover, the evidence justified the instruction. Stewart argued at trial that he lacked the intent to defraud because he relied upon the findings of solvency reported in state examinations and audit reports. But the evidence permitted the jury to conclude that this was simply not the case. The jury could have found that Stewart deliberately closed his eyes to what otherwise would have been obvious to him concerning the financial problems of these companies. Stewart could have recognized the likelihood of insolvency yet deliberately avoided learning the true facts. Therefore, the instruction was justified in this instance.

E. Did the district court fail to give the jury a proper unanimity charge?

Stewart argues that the district court violated his right to a unanimous verdict on all of the counts of the indictment by not giving a unanimity charge. However, we find this contention to be insubstantial because Stewart did not object to the unanimity instructions, and, in fact, if there had been error on the court's part concerning Counts 2, 4, 14, 16 through 19, and 22 (for mail and wire fraud), Stewart invited it by objecting to the government's proposed unanimity charge on those counts. Joint app. at 3053–54. Thus, Stewart has waived all of these issues on appeal, and we would reverse only if the court committed plain error in instructing the jury on the counts where Stewart did not invite the error. *See United States v. Zehrbach*, 47 F.3d 1252, 1260 (3d Cir. 1995) (general waiver); *United States v. Console*, 13 F.3d 641, 660 (3d Cir. 1993) (invited error).

In any event, we find no plain error in the court's charges, and indeed no error at all in the district court's unanimity instructions. We begin our discussion on this point with the mail and wire fraud charges inasmuch as they are the basis of the RICO and money laundering counts.

The court began early in its charge with a general instruction that "each of the 135 counts of the superseding indictment which are before you for decision . . . must be considered separately." Joint app. at 3010. Moving to the specific mail and wire frauds charges, the court informed the jury that "each separate use of the

mails or wires in furtherance of the scheme to defraud constitutes a separate offense or violation of the mail and wire fraud statutes." *Id.* at 3035.

This instruction followed the court's setting out of the four schemes alleged in the indictment. The court charged the jury that Counts 2, 4, 14, and 16 through 19 for mail fraud and Count 22 for wire fraud described a scheme to "defraud and to obtain money and property by wrongfully taking valuable assets from Summit . . . and [EBL]. . . ." *Id.* at 3024–25. The court distinguished this scheme from that set forth in Counts 24 through 32 for wire fraud that alleged a scheme "to deceive state insurance regulators involving reinsurance." *Id.* at 3025. The court then outlined the scheme "to defraud and obtain money and property by inflating Summit['s] . . . financial statements with overvalued promissory notes from its parent, its corporate parent, SNL Corp., in order to deceive regulators, the buyer and others regarding the true financial condition of the company" set forth in Counts 33, 36 through 73 and 76 through 118 for mail fraud. *Id.* at 3025–26. Finally, at the conclusion of its instructions, the court repeatedly admonished the jury that it was required to agree unanimously on "each count" of the indictment. *Id.* at 3049–3052. We find these instructions sufficiently clear to ensure that the jury understood that it must agree unanimously on each count of the mail and wire fraud allegations set forth in the indictment.

Likewise, the court's instructions concerning the RICO and money laundering charges were quite clear. In describing the alleged acts of racketeering, the court referred back to its instructions on the mail and wire fraud charges and later directed the jury that it "must unanimously agree on the identity of at least two of the same racketeering acts alleged to have been committed by [Stewart]." *Id.* at 3039–41. Similarly, the court again referred back to its instructions regarding the mail and wire fraud charges when instructing the jury on the money laundering counts. *See id.* at 3044, 3046. Thus, considering these instructions in their entirety, even if Stewart had not waived the issue or invited the error, we would conclude that the court's instructions were clear on the unanimity issue.

Finally, we note that because the jury convicted Stewart on all 135 counts of the indictment, even if the district court erred in charging the jury on unanimity, such error would be harmless be-

yond a reasonable doubt. *See United States v. Edmonds*, 80 F.3d 810, 812–13 (3d Cir. 1996) (en banc). Inasmuch as the jury reached a unanimous agreement on each count, including those counts that were predicate offenses for RICO and the money laundering charges, it could not possibly have disagreed on any elements of the individual crimes. This case is simply not one in which some jurors relied on a fraudulent mailing while the others relied upon a fraudulent wire transfer in convicting on the RICO charges.

Contrary to Stewart's assertions at oral argument, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), does not preclude us from finding harmless error in this instance. The Supreme Court held in *Sullivan* that an erroneous reasonable doubt instruction cannot be harmless because this error calls the ultimate verdict of guilt into doubt. *Id.* at 280–81, 113 S. Ct. at 2082. As we recognized in *Edmonds*, while *Sullivan* concerned a situation where "an erroneous reasonable doubt instruction undermined all of the jury's findings, the jury in this case delivered valid findings on essentially all of the elements of the offense by convicting [the defendant] of every violation.. . ." *Edmonds*, 80 F.3d at 812. Thus, we do not doubt the validity of the jury's verdict here, nor do we question that this verdict reflects anything but its unanimous agreement on each element of each count of the indictment. Accordingly, we will affirm.

F. Did the district court err in concluding that the Account was not directly forfeitable?

We now consider two appeals from the October 6, 1998 forfeiture order. In the first, Stewart raises a number of challenges to the order, including a Sixth Amendment claim that the forfeiture prevented him from using the forfeited money to finance his criminal defense. Stewart's claims depend on the assumption that the Account could be forfeited only as a substitute asset.[6] We un-

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[6] Stewart's claims are: (i) that because the Account was forfeitable only as a substitute asset, the district court had no power to restrain it from May 1998 to October of that year, the time between Stewart's request to lift the pre-trial restraints and the court's order forfeiting the Account as a substitute asset; (ii) that forfeiture of the Account under the substitute asset provision violates his Sixth Amendment right to counsel because he intended to use these funds to pay his post-conviction attorneys; (iii) that prior to entering the substitute asset forfeiture order, the district court failed to ascertain correctly the shortfall in the government's recovery of directly forfeited property; and (iv) that when his sentence,

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derstand him to concede, however, that his claims on appeal must fail if the Account was directly forfeitable rather than forfeitable merely as a substitute asset and, in any event, that is the case. The government cross-appeals, claiming that the district court erred in failing to forfeit the Account directly under the relevant money laundering provision, 18 U.S.C. § 982(a)(1).

We will affirm the district court's judgment of forfeiture but will reverse the court's order finding that the Account was not directly forfeitable. Thus, we will modify the forfeiture order. Inasmuch as we agree with the government's argument that the Account was directly forfeitable as proceeds of a money laundering violation, we need not reach the issues Stewart raises.[7]

We begin our analysis of the district court's forfeiture order by considering the jury's verdict in this case. In its special forfeiture verdict, the jury declined to forfeit the Account as property acquired or maintained as a result of Stewart's RICO violations. But the jury did find Stewart guilty on Count 153, a money laundering count under 18 U.S.C. § 1957, which charged him with having withdrawn illegally $3 million from the account of Tartan Management. In Count 157, the jury specifically forfeited these funds under 18 U.S.C. § 982. At the sentencing hearing in August, the Government used appropriate records to trace the $3 million forfeited by the jury to the Account. Yet, the district court concluded that, under *United States v. Voigt*, 89 F.3d 1050, the money in the Account could be forfeited only under the substitute asset provision. While we understand why the district court reached this conclusion, we find its ruling erroneous because the facts of *Voigt* are distinguishable from the facts of this case.

In *Voigt*, the government sought to forfeit directly jewelry that a defendant had purchased with funds from an account in which money laundering proceeds had been commingled with other funds. *See* 89 F.3d at 1081. There had been numerous intervening deposits and withdrawals between the deposit of the tainted money and the purchase of the jewelry. *See id.* Considering these facts, we

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fine, restitution and forfeiture orders are considered together, the forfeiture of the Account as a substitute asset is excessive under the Eighth Amendment.

[7] We review *de novo* as involving a legal question the district court's interpretation of the money laundering forfeiture provisions so as to forfeit the Account as a substitute asset rather than as criminal proceeds. *See In re Assets of Martin*, 1 F.3d 1351, 1357 (3d Cir. 1993).

concluded that the government simply could not show by a preponderance of the evidence, as it was required to do under the money laundering statute, that the jewelry was "involved in" or "traceable to" the defendant's illegal activity. *See id.* at 1082 (citing the money laundering direct forfeiture provision, 18 U.S.C. § 982(a)(1)). Moreover, we stated that an interpretation of the statute allowing the government to forfeit directly the jewelry would force the court to ignore the substitute asset forfeiture provision, which specifically provides for the forfeiture of property as a substitute asset when property involved in or traceable to the criminal activity "has been commingled with other property which cannot be divided without difficulty." *See id.* at 1085 (citing the substitute asset provision, 21 U.S.C. § 853(p)(5), incorporated into the money laundering statute).

This case, however, presents quite different facts. First, the government is not seeking to forfeit property purchased with commingled funds. Thus, we are not dealing with property analogous to the jewelry in *Voigt*. Instead, after tracing the $3 million transfer to the Account, which previously contained only $160,000, the government seeks to forfeit directly the remaining approximately $2.6 million. Second, this case does not involve numerous withdrawals and deposits from and into an account containing commingled funds because almost immediately after Stewart transferred the $3 million into the Account, the court restrained withdrawals from the Account. Since that time, the only withdrawal from the Account was the $600,000 that the government agreed to allow Stewart to use to pay his trial attorney.

The single withdrawal aside, the question posed by this appeal is whether the government may forfeit directly tainted funds from an account that has been frozen from the time of the illegal transfer but that also contains untainted money. It is true that *Voigt* appeared to answer this question in the negative: in a footnote, the court stated that the substitute asset provision would have to apply to commingled cash even if "one readily could separate out the amount subject to forfeiture." 89 F.3d at 1088 n.24. But this statement in *Voigt* is dicta because *Voigt* was not a case in which "one readily could separate out the amount subject to forfeiture." Accordingly, the holding of *Voigt* does not require us to find against direct forfeiture in this case.

Indeed, if we were to rule against direct forfeiture in this case our holding would contradict congressional intent as expressed in the money laundering forfeiture statute. Property is directly forfeitable under that statute when it is "involved in" or "traceable to" the defendant's illegal activity. 18 U.S.C. § 982(a)(1). Here, the government clearly traced laundered funds forfeited by the jury to Stewart's Account. Stewart does not contest this tracing, which in any event the government clearly established. Moreover, the substitute asset provision of the statute applies only when commingled property cannot be "divided without difficulty." 21 U.S.C. § 853(p)(5).

The *Voigt* panel surely was accurate when it concluded that the substitute asset provision must be used "once a defendant has commingled laundered funds with untained funds . . . such that they 'cannot be divided without difficulty.' " 89 F.3d at 1088 (citing 21 U.S.C. § 853(p)(5)). We do not see any difficulty, however, in separating out the tainted $3 million from the untainted $160,000 that the Account contained. There would be a difficulty only if one were to attach significance to which actual bills were left in a defendant's account after the direct forfeiture; certainly a defendant has no legitimate interest in preferring one dollar bill to another as long as he is left with the same amount of legitimate funds.

Neither does the fact that the government agreed to the withdrawal of $600,000 from the Account to finance Stewart's trial defense affect our direct forfeiture analysis. As the government made clear at oral argument, Stewart agreed that untainted money would be deemed withdrawn first. Because the Account contained only $160,000 of untainted funds, Stewart already has used the funds in the Account to which he was entitled legitimately. We therefore conclude that the remaining approximately $2.6 million in the Account should be forfeited directly to the government under the money laundering forfeiture provision, 18 U.S.C. § 982(a)(1).

IV. *CONCLUSION*

For the foregoing reasons, we will modify the district court's October 6, 1998 forfeiture order so that the forfeiture is direct rather than of a substitute asset. As modified, we affirm the forfeiture order and we will affirm the judgment of conviction and sentence entered August 13, 1998, and all other orders on appeal.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1260, 98-1302, 98-1541,
98-1716, 98-1860, and 98-1968

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1260

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1302

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1541

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1716

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1860

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,
Appellant in No. 98-1968

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 96-00583-1)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, and SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, and RENDELL, *Circuit Judges*, and DOWD,* *District Judge*

The petition for rehearing filed by the appellant/cross-appellee, Allen W. Stewart, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Dowd's vote is limited to voting to deny rehearing before the original panel.

BY THE COURT:

/s/
Circuit Judge

DATED: [August 18, 1999]

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART.

Criminal Action No. 96-583.

United States District Court,
E.D. Pennsylvania.

Feb. 21, 1997.
(955 F. Supp. 385)

On December 4, 1996, the grand jury returned a 63 count indictment against Allen W. Stewart ("Stewart"). It charges: (1) a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962; (2) 12 acts of mail fraud, in violation of 18 U.S.C. § 1341; (3) 13 acts of wire fraud, in violation of 18 U.S.C. § 1343; and (4) 35 acts of money laundering in violation of 18 U.S.C. § 1957. The final two counts of the indictment seek forfeiture of Stewart's assets.

Stewart now moves this court to dismiss the indictment on two grounds pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure.[1] He states that the indictment fails to allege all the required elements of a RICO violation and that the entire indictment is "preempted" by state law by reason of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq.

In a motion to dismiss the indictment we accept as true the facts alleged in the indictment and determine if those facts "constitute the violation of law for which [the defendant] is charged." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir.), *cert. denied*, 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 107 (1988); *United States v. Seitz*, Crim. A. No. 96- 272-2, 1997 WL 34690, at *1 (E.D.Pa. Jan. 29, 1997). If the facts do not constitute a viola-

[1] Stewart does not specifically mention the subsection of the rule on which he is relying to dismiss the indictment. We assume it is pursuant to Rule 12(b)(2) which provides in relevant part "[t]he following must be raised prior to trial ... (2)[d]efenses and objections based on defects in the indictment or information...."

tion of federal law, the charges should be dismissed. *Polychron*, 841 F.2d at 834.

According to the indictment, Stewart committed a pattern of racketeering activity through his association with Summit National Life Insurance Company ("Summit"), now incorporated in Pennsylvania, which he purchased in 1988. ¶ 3. Stewart allegedly "acquired control of Summit ... through a scheme wherein the costs of acquiring the company, including the purchase price, were paid from the insurance company's own funds after it was acquired." ¶ 6. By acts of wire and mail fraud, Stewart devised and furthered schemes to siphon funds out of Summit as well as Equitable Beneficial Life Insurance Company ("Equitable"), another Pennsylvania domestic life insurance company he controlled. ¶¶ 4, 11. Summit's capital and surplus was $38 million when Stewart purchased the company in 1988, but decreased to negative $80.5 million by 1993. ¶ 10. Likewise, Equitable's capital and surplus was reduced from $2 million in 1988 to negative $43.2 million in 1993. ¶ 12. Through a series of transactions which inflated the book value of Summit's and Beneficial's assets, Stewart concealed his theft of funds from the public, insurance regulators, policyholders, customers, potential customers, insurance agents, and others. ¶¶ 28, 46–47, 51. Stewart sold both insurance companies in 1993. ¶ 13.

I

Stewart contends that these allegations, even if true, do not comprise a RICO violation under 18 U.S.C. § 1962(c),[2] because an entity cannot be both the enterprise through which the racketeering acts were committed and the victim of such racketeering activity. Since the indictment states that Summit was the enterprise as well as the victim, Stewart argues that no RICO violation exists and this count must be dismissed.

Congress originally enacted RICO to combat organized crime. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487, 105 S.Ct. 3275, 3280, 87 L.Ed.2d 346 (1985). However, it "has become a tool for everyday fraud cases brought against respected and legitimate enterprises." *Id.* at 499, 105 S.Ct. at 3286. The statute is to be "lib-

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[2] The indictment does not specify which portion of § 1962 was violated, but its language mirrors that of § 1962(c).

erally construed." Pub.L. 91-452, § 904(a), 84 Stat. 947. Section 1962(c) of RICO, states:

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). An enterprise is broadly defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). A pattern of racketeering activity arises when at least two acts of racketeering are committed within ten years of each other. 18 U.S.C. § 1961(5).

In *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994), the United States Supreme Court addressed the enterprise requirement. It stated that the term enterprise "connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity." *Id.* at 259, 114 S.Ct. at 804. The Third Circuit has interpreted this language to mean that a

> victim corporation "drained of its own money" by pilfering officers and employees could not reasonably be viewed as the enterprise through which employee persons carried out their racketeering activity. Rather, in such an instance, the proper enterprise would be the association of employees who are victimizing the corporation, while the victim corporation would not be the enterprise, but instead the § 1962(c) claimant.

Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 267 (3d Cir. 1995). Stewart is correct that the enterprise and victim cannot be the same entity.

However, a reading of the indictment establishes that the enterprise and the victim are not entirely the same in this case. In paragraphs 2 and 3, the enterprise is described not only as Summit, but also as Stewart. The victims of the schemes to defraud included Summit as well as Beneficial, the regulators, policyholders,

customers, potential customers, insurance agents, the public, and others. ¶¶ 10, 11, 28, 46–47, 51. Stewart cites no case in which a criminal RICO count was entirely dismissed solely because the victim and the enterprise overlapped. We agree with the government that the better remedy is an instruction to the jury that before any criminal liability attaches it must find that someone other than Summit was a victim of Stewart's acts of racketeering.

Stewart also maintains that the indictment is defective because it charges him with the improper acquisition of Summit. That is not, and cannot be, a § 1962(c) violation.[3] While paragraphs 16 through 26, entitled "Acquisition of Summit National Life Insurance Company," introduce Racketeering Act 1, the acquisition is not charged as a separate criminal act. The only predicate act specifically related to the acquisition of Summit appears to be Racketeering Act 1A which refers to a wire transfer of money from Equitable used as part of the purchase money for Summit. The indictment does not suggest that the procurement of Summit was a separate scheme or racketeering act or that it violated § 1962(c). It is merely relevant information surrounding the detailed plot to defraud. As such, we find no merit to Stewart's position.

II

Stewart next argues that the McCarran-Ferguson Act "preempts" the indictment, that is, that federal law withdraws its preemption and allows state rather than federal law to control.[4] Prior to 1944, insurance regulation was solely within the domain of the states since insurance was not considered to be interstate commerce. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1868). A dramatic turn occurred in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), a criminal antitrust case, when the United States Supreme Court held that insurance was a transaction of interstate commerce subject to federal regulation. In response, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et*

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[3] Rather, such an acquisition would be a violation of §§ 1962(a) or (b).

[4] The term "preemption" refers to "certain matters [that] are of such a national, as opposed to local, character that federal laws [ ] take precedence over state laws." Black's Law Dictionary (6th ed. 1990). Because under the McCarran-Ferguson Act, state law would be displacing federal law, the term preemption is not accurate.

seq., which reaffirmed the primacy of state regulation of insurance. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538–39, 98 S.Ct. 2923, 2928-29, 57 L.Ed.2d 932 (1978). The Act provides, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). With respect to federal regulation, the Act continues in pertinent part:

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).

To decide whether a federal law must yield to state law pursuant to the McCarran-Ferguson Act, we must consider four questions: (1) does the federal law specifically relate to the business of insurance? (2) has Pennsylvania enacted any law for the purpose of regulating the challenged activity? (3) does the challenged activity constitute the business of insurance? and (4) would application of the federal law invalidate, impair, or supersede the state law? *Cochran v. Paco, Inc.*, 606 F.2d 460, 464-66 (5th Cir.1979); *First Nat'l Bank of Pa. v. Sedgwick James of Minn., Inc.*, 792 F.Supp. 409, 417 (W.D.Pa.1992).

Stewart and the government agree that federal criminal laws in issue do not specifically relate to the business of insurance. *See Senich v. Transamerica Premier Ins. Co.*, 766 F.Supp. 339, 340 (W.D. Pa. 1990). Likewise, the parties are in accord that the Commonwealth of Pennsylvania has enacted laws governing the challenged activity. It is on the third and fourth issues where the parties disagree. If the challenged activity constitutes the business of insurance and federal law would invalidate, impair, or supersede state law, the indictment is barred. *Cochran*, 606 F.2d at 464. Otherwise, the indictment stands.

We must first determine if the challenged activity, alleged of Stewart, constitutes the "business of insurance." *Cochran*, 606 F.2d at 464–66. The meaning of the term does not include all the functions and operations of an insurance company. In noting its limited scope, the Supreme Court has said that "[i]nsurance com-

panies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the [McCarran-Ferguson] statute apply." *SEC v. National Sec., Inc.*, 393 U.S. 453, 459–60, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969).

The Supreme Court has held that, in determining whether an activity is the "business of insurance," we must ask:

> first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself....

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 3009, 73 L.Ed.2d 647 (1982) (emphasis omitted). In *United States Department of Treasury v. Fabe*, 508 U.S. 491, 504, 113 S. Ct. 2202, 2209–10, 124 L.Ed.2d 449 (1993), the Court explained that the business of insurance also includes the performance of the insurance contract because "[w]ithout performance of the terms of the insurance policy, there is no risk transfer at all." In that case, an Ohio statute gave the claims of policyholders priority over claims of the federal government in the liquidation of an insolvent insurance company, in direct contravention of federal bankruptcy law. *Id.* at 493, 113 S. Ct. at 2204. The Court upheld that state statutory provision under the McCarran-Ferguson Act because it protected policyholders. *Id.* at 493–94, 113 S. Ct. at 2204. The Court reasoned that "the enforcement of insurance contracts by ensuring the payment of policyholders' claims ... [was] integrally related to the performance of insurance contracts after bankruptcy." *Id.* at 504, 113 S. Ct. at 2209.

According to the indictment, the challenged activity of Stewart consisted of the use of the wires and mails for fraudulent transactions to siphon large sums of money from two insurance companies he controlled, rendering them insolvent. While Stewart's actions obviously affected the insurance companies and thus their policyholders, that is not the test for determining whether he was engaged in the business of insurance. The applicable standard under the McCarran-Ferguson Act is much more circumscribed.

Fabe, 508 U.S. at 508–09, 113 S. Ct. at 2211–12; *Pireno*, 458 U.S. at 128–33, 102 S. Ct. at 3008–11. Stewart's activities, even if legitimate, do not fit within any of the guideposts enunciated by the Supreme Court. They did not have "the effect of transferring or spreading a policyholder's risk," and were not an "integral part of the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129, 102 S. Ct. at 3009. Moreover, the financial transactions in which Stewart was engaged, whether they be legal or illegal, were not of the kind that are "limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129, 102 S. Ct. at 3009. Nor are we concerned here with priority of payments to policyholders under a liquidation statute so as to carry out the performance of contracts. *See Fabe*, 508 U.S. at 493, 113 S. Ct. at 2204. We conclude that Stewart was not engaged in the business of insurance when he undertook the activities alleged.

Assuming, however, that Stewart's conduct was the business of insurance because in some broad sense it undermined the performance of insurance contracts, we next consider whether the prosecution of this case, based upon RICO, as well as mail and wire fraud, will "invalidate, impair or supersede" any Pennsylvania law enacted for the purpose of regulating the business of insurance. *Cochran*, 606 F.2d at 464. If so, the indictment must be dismissed. Since the terms "invalidate, impair or supersede" are not defined in the McCarran-Ferguson Act, we will apply their ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 186–88, 115 S. Ct. 788, 793, 130 L. Ed. 2d 682 (1995). To invalidate means to "make invalid, deprive of efficacy," while impair signifies to "lessen in quality or strength, damage." New Webster's Dictionary and Thesaurus 485, 508 (1993). To supersede is to "outmode and take the place of." *Id.* at 994.

In *SEC v. National Securities Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969), the Supreme Court was confronted with a merger between two insurance companies which the state of Arizona had approved but which the Securities and Exchange Commission ("SEC") sought to unravel because of fraud. *National Sec.*, 393 U.S. at 455–56, 89 S. Ct. at 566–67. The merged insurance company defended on the ground that the federal securities law impaired the state insurance law under which the merger had been endorsed. *Id.* at 457, 89 S. Ct. at 567. The Court first noted that Arizona was not regulating the relationship between insurer and insured, but between the stockholder and the company. *Id.* at

460, 89 S. Ct. at 568–69. In determining whether the application of federal securities law would supersede or impair state law, it found that the SEC's complaint focused not on the merger, but on the fraud. *Id.* at 462, 89 S.Ct. at 569–70. "The merger became relevant only insofar as it was necessary to attack it in order to undo the harm caused by the alleged deception." *Id.* Although conceding the possibility of a "most indirect" impairment, the Court emphasized the fact that the "Federal government is attempting to protect security holders from fraudulent misrepresentations." *Id.* at 463, 89 S. Ct. at 570. Because the federal interest in protecting shareholders was "perfectly compatible" with the state interest in protecting policyholders, the federal securities laws did not invalidate, impair or supersede state law. *Id.*

Defendant points us to several cases which held that the McCarran-Ferguson Act invalidated a civil RICO claim because application of RICO in that context would impair, invalidate, or supersede state regulatory provisions. *See Kenty v. Bank One*, 92 F.3d 384, 392 (6th Cir. 1996); *Ambrose v. Blue Cross & Blue Shield*, 891 F. Supp. 1153, 1168 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996); *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 203 (M.D. Pa. 1993); *Senich*, 766 F. Supp. at 342; *Richhart v. Metropolitan Life Ins. Co.*, Civ. A. No. 89-1725, 1990 WL 39268, at *3 (E.D. Pa. Mar. 30, 1990). However, these cases involved transactions which can be characterized as the business of insurance. In all, the insureds sued their insurers on account of some alleged wrongdoing related to the purchase or terms of their insurance policies. *Kenty*, 92 F.3d at 388–89; *Ambrose*, 891 F. Supp. at 1155–56; *Wexco*, 820 F. Supp. at 196–97; *Senich*, 766 F. Supp. at 341; *Richhart*, 1990 WL 39268, at *1. The courts held that applying RICO would impair, invalidate or supersede state regulatory provisions because RICO allowed a private cause of action when state law did not. *Ambrose*, 891 F. Supp. at 1165; *Wexco*, 820 F. Supp. at 203; *Senich*, 766 F. Supp. at 341; *Richhart*, 1990 WL 39268, at *3. Moreover, the remedies RICO provides, including treble damages and attorney's fees, significantly differed from those provided to private parties under their respective state laws. *Kenty*, 92 F.3d at 392; *Ambrose*, 891 F. Supp. at 1165; *Wexco*, 820 F. Supp. at 203. In contrast, this is a criminal action. The federal government is not a private plaintiff seeking to act outside of the state's regulatory scheme. Therefore, these cases are not controlling.

At least three criminal cases have held that the federal government's prosecution for mail fraud and related offenses survived the McCarran-Ferguson Act.[5] *See United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994); *United States v. Sylvanus*, 192 F.2d 96, 100 (7th Cir. 1951), *cert. denied*, 342 U.S. 943, 72 S. Ct. 555, 96 L. Ed. 701 (1952); *United States v. Schmittzehe*, Crim. A. No. 91-514, 1994 WL 635030, at *4 (E.D. La. 1994).

In *Cavin*, the defendants were charged with conspiracy to defraud state insurance regulators and policyholders, as well as other offenses including mail and wire fraud. *Id.* at 1304. Like the present case, the indictment arose out of fraudulent financial transactions affecting an insurance company's solvency. The court held that the federal government's "interest in the fraud prosecution is completely compatible with the state's regulatory interests." *Id.* It found unpersuasive a defendant's argument that he was being federally prosecuted for conduct permitted by the Insurance Commissioner of Louisiana. *Id.* Similarly in *Sylvanus*, which involved misrepresentations in the sale of insurance policies, the Seventh Circuit upheld a conviction for mail fraud and conspiracy to commit mail fraud notwithstanding the McCarran-Ferguson Act. *Sylvanus*, 192 F.2d at 99–100. It stated:

> [w]e conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, so [sic] surrender control of the use of the mails or to cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to defraud and that the district court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment.

Id. at 100.

The Eastern District of Louisiana also employed the McCarran-Ferguson Act analysis to determine if a criminal mail fraud and conspiracy to commit mail fraud prosecution was valid. *See Schmittzehe*, 1994 WL 635030, at *1–4. There, as in *Cavin* and the

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[5] The Fifth Circuit upheld a federal prosecution very similar to the instant case, but the McCarran-Ferguson Act was not mentioned. *See United States v. Krenning*, 93 F.3d 1257 (5th Cir. 1996).

present action, the indictment concerned financial manipulations of an insurance company. The court held that such a prosecution was within the federal court's jurisdiction.[6] *Id.* Under the fourth factor of the McCarran-Ferguson Act analysis, the court explained that despite the fact that the penalties differed between state and federal laws, the application of the federal mail fraud statute would not invalidate, impair, or supersede state law. *Id.* It observed that the mail fraud laws "do not instruct Louisiana how to sell, structure, or enforce an insurance policy. Nothing in the indictment limits or interferes with the power of state officials to perform their statutory duties, or to regulate [the] insurance business." *Id.*

In support of his position, Stewart cites an array of Pennsylvania insurance laws which are potentially implicated by this federal prosecution. (Mem. of Law in Supp. of Def's Mot. to Dismiss at 12–14.) He argues that a conviction on federal charges would "effectively subject Stewart's purported accounting and reporting malfeasance to penalties and disabilities vastly more severe than any envisioned by Pennsylvania's insurance laws." (Mem. at 15.) He submits that criminal sanctions completely change the remedy scheme set forth under state law, rather than just supplement that scheme. (Mem. at 16.) Stewart also contends that standards of liability between the federal and state statutes "might well differ." (Mem. at 18.) Stewart's argument misses the mark. The federal government is not challenging Pennsylvania's financial or other standards for its domestic insurance companies. Nor is it infringing upon the relationship between the insurer and its policyholder or its insured reserved to the states. *See Schmittzehe*, 1994 WL 635030 at *3.

The federal interest here is to protect the public from acts of racketeering and from use of the mails and wires for fraudulent purposes. That effort is "perfectly compatible" with the Com-

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[6] In analyzing the third McCarran-Ferguson factor, the court stated that the activity

> involved not the relationship between insurer and insured, but rather the relationship between the insurer and the state regulators. The alleged fraudulent use of the mails did not affect the transferring or spreading of the policyholder's risk or form an integral part of the relationship between insurer and insured, nor did it consist of a practice limited to entities within the insurance industry.

Schmittzehe, 1994 WL 635030 at *3.

monwealth's interest in protecting policyholders and with its insurance regulatory responsibilities generally. *National Sec.*, 393 U.S. at 463, 89 S. Ct. at 570; *Cavin*, 39 F.3d at 1304; *Sylvanus*, 192 F.2d at 100; *Schmittzehe*, 1994 WL 635030, at *3. The prosecution of Stewart will not invalidate, impair, or supersede the laws of Pennsylvania regulating the business of insurance. It is no more intrusive than the federal government's action in *National Securities* which sought to undo the fraudulent merger of two insurance companies already approved under state insurance law. Unlike *Fabe*, there is no clash between federal and state law. The McCarran-Ferguson Act, at least under the facts alleged in this case, does not shield a person accused of criminal conduct in violation of the laws of the United States.[7]

The motion of Allen W. Stewart to dismiss the indictment will be denied.

ORDER

AND NOW, this 21st day of February, 1997, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Allen W. Stewart to dismiss the indictment is DENIED.

[7] Because Stewart does not mention the applicability of the McCarran-Ferguson Act to the money laundering charges, we will not address it.

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART

No. CRIM.A. 96-583.

United States District Court, E.D. Pennsylvania.

Oct. 23, 1997.
(1997 WL 688815)

MEMORANDUM

This is a criminal action in which defendant Allen Stewart is charged under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* The superseding indictment also contains separate counts of mail and wire fraud as well as money laundering and seeks forfeiture of certain assets. Presently before the court is the motion of the defendant to dismiss the superseding indictment for failure to state an indictable offense.[1]

In a motion to dismiss an indictment we accept as true the facts alleged and determine if those facts "constitute the violation of law for which [the defendant] is charged." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir.), *cert. denied*, 488 U.S. 851, 109 S. Ct. 135, 102 L. Ed. 2d 107 (1988); *United States v. Seitz*, 952 F. Supp. 229, 230 n. 1 (E.D. Pa. 1997). If the facts do not constitute a violation of federal law, the charges should be dismissed. *Polychron*, 841 F.2d at 834.

The superseding indictment, which consists of 157 counts, charges that defendant committed a pattern of racketeering activity through his association with Summit National Life Insurance Company ("SNLIC"), an insurance company now incorporated in Pennsylvania. Defendant originally purchased SNLIC in 1988, when it was incorporated in Ohio. By acts of wire and mail fraud,

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[1] The original indictment was filed on December 4, 1997. Defendant filed a motion to dismiss the indictment, which we denied in a Memorandum and Order on February 21, 1997. The government filed its superseding indictment on March 12, 1997.

he allegedly devised and furthered schemes to siphon millions of dollars out of SNLIC as well as Equitable Beneficial Life Insurance Company ("EBL"), another Pennsylvania life insurance company he controlled. Through a series of transactions which inflated the book value of SNLIC's and EBL's assets, he purportedly concealed his theft of funds from the public, insurance regulators, policyholders, customers, potential customers, insurance agents, and others.

Specifically, Count 1 charges defendant with violating § 1962(c) of RICO. Counts 2 through 120 assert that defendant committed mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. The superseding indictment declares in several places that defendant "devised and intended to devise a scheme to defraud and to obtain money and property, directly and indirectly, by means of false and fraudulent pretenses and representations." *See, e.g.*, Superseding Indictment at p. 23, ¶ 3. It describes the various mail and wire fraud schemes created by defendant. It details the mailings and wires, including the places from which they were sent and the persons to whom they were directed. The first scheme, set forth in Counts 2 through 23 involved the removal of valuable assets from SNLIC and EBL. To facilitate this scheme defendant purportedly sent quarterly financial statements to the Pennsylvania Insurance Department, among others. Checks for payment of printing or publication of annual statements were sent to publishing companies, letters were sent to Merrill Lynch seeking the transfer of funds, and wires were even sent to EBL itself.[2]

The government also alleges, in Counts 24 through 32, a design to deceive regulators regarding reinsurance. It was advanced through wires sent to the California Department of Insurance and to and from Alabama Reassurance Company.

Counts 33 through 120 portray a stratagem to inflate SNLIC's financial statements with an overvalued promissory note from its corporate parent, SNL Corporation. SNLIC financial statements, identifying this inflated asset, were mailed to insurance departments in 43 states, the National Association of Insurance Commissioners, and A.M. Best Company. Several checks were also sent to publishing companies to pay for the printing or publication of the SNLIC financial statements.

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[2] Count 2 states that an abstract of an SNLIC annual statement was mailed to Corporation Publication in Nevada.

According to the superseding indictment, the object of these three schemes was to "obtain, directly and indirectly, other money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, legal fees, and an inflated sales prices for the companies." Superseding Indictment, at p. 31, ¶ 34.

The remainder of the superseding indictment includes allegations that defendant illegally laundered money in violation of 18 U.S.C. § 1957. The final two counts seek forfeiture of money and property obtained as a result of his alleged racketeering and money laundering activity. In his pending motion, defendant asserts various bases for the dismissal of the superseding indictment. Only one of these arguments requires any extended discussion. Defendant contends that, under the mail and wire fraud statutes, an indictment must allege that any deceit or fraud was directed at the party from whom money or property was sought. According to defendant, the superseding indictment is fatally defective because it states that the fraud was directed at the government regulators but does not specify that any money or property was sought or taken from them. Even if the insurance department officials were the only intended victims, defendant's argument is without merit.

The mail fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or takes or receives therefrom, any such matter or thing, ..., shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341.[3] The Supreme Court has explained that the elements of this crime include: "(1) a scheme to defraud, and (2) the mailing of a letter, etc. for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of

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[3] The wire fraud statute is identical except that the wrongdoer "transmits or causes to be transmitted by means of wire, ... any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343.

the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8, 74 S. Ct. 358, 98 L. Ed. 435 (1954).

In *McNally v. United States*, 483 U.S. 350, 358–59, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), the Supreme Court held that a defendant's scheme or artifice must have as its purpose to deprive a victim of money or property in order to be convicted under the mail fraud statute. *McNally* involved the prosecution of a Kentucky public official and a private citizen. They had participated in a scheme whereby an insurance agency receiving business from the Commonwealth of Kentucky paid a portion of the commissions the agency received from insurers to another insurance agency in which the official had an interest. *Id.* at 352–54. While the Commonwealth lost no money or property in the scheme, the federal prosecutor claimed that this ploy "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353. However, the Supreme Court concluded that this was too broad a reading of the mail fraud statute and overturned the conviction. *Id.* at 360. It held that a scheme or artifice to defraud must have as its aim the purloining of money or property. *Id.* at 359.

Unhappy with the Supreme Court's decision in *McNally*, Congress enacted 18 U.S.C. § 1346. *See* 134 Cong. Rec. H11108-01, 1988 WL 182261 (Oct. 21, 1988). As a result of this statute, a "'scheme or artifice to defraud' now includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S..C. § 1346. While other Courts of Appeals have determined that this language is limited to the honest services of government officials, the Third Circuit has not passed upon its scope. *See United States v. Brumley*, 116 F.3d 728, 734–35 (5th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3204 (U.S. Sept. 15, 1997) (No. 97-486); *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

The Third Circuit has made clear, nonetheless, that the mail fraud statute is to be construed broadly. *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017, 111 S. Ct. 591, 112 L. Ed. 2d 595 (1990). In *Martinez*, the defendant was convicted of mail fraud for his role in obtaining for a co-conspirator a medical license from the Commonwealth of Pennsylvania. *Id.* at 710–11. On appeal he contended that the mail fraud statute required a scheme or artifice to deprive a victim of money or property but that the Commonwealth of Pennsylvania, as the

victim, did not suffer any such loss. *Id.* at 713. The Third Circuit rejected this argument. It held that the medical license constituted property within the meaning of the statute. *Id.* at 713–15. It stated:

> *McNally* only requires that the "[g]overnment's interests as property holder" be implicated in order for a scheme to fall within the mail fraud statute ... a license is essentially one manifestation of the government "largess" of the modern state which "is originally public property, comes from the state, and may be withheld completely." ... what the Commonwealth (and derivatively its people) lost was the right to keep its medical licenses to itself and to bestow them on persons who had fairly earned them.

Id. at 714 (citations omitted).

In Pennsylvania as in other states as well, the business of insurance, like the medical profession, is highly regulated. Without state authorization, one cannot open or operate an insurance company anymore than one can open or conduct a medical practice. An insurer in the Commonwealth must obtain a "certificate authorizing the company to commence business." Pa. Stat. Ann. tit. 40, § 405 (West 1992). To maintain its authority to do business, an insurer must remain financially sound. One way for the Insurance Department to determine if an insurer continues to be viable is to review its financial statements, which it is required by law to file. *Id.* § 443(a)(1). Failure to file can result in fines and a prohibition against writing new business. *Id.* § 443(e)(1). In addition, the Insurance Commissioner may even "suspend, revoke or refuse to renew the certificate of authority of any insurer failing to file its annual statement when due." *Id.* § 443(e)(3).[4]

Implicit, of course, is the duty to submit accurate information. By filing purportedly deceptive financial statements which appeared to show SNLIC as a financially healthy insurer, defendant schemed to retain the certificate authorizing SNLIC to conduct business in Pennsylvania and other states. While the certificate,

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[4] The Insurance Commissioner may also require that the insurer file its financial statements with the National Association of Insurance Commissioners. Pa. Stat. Ann. tit. 40, § 443(a)(2) (West Supp. 1997).

like the medical license in Martinez, may take on value only in the hands of the recipient, it is the property of the Commonwealth nonetheless. *Martinez*, 905 F.2d at 713. If a recipient retains a certificate through fraud and deception, the Commonwealth and its people lose the right to have the certificate returned and to keep it from those who no longer are fairly entitled to it. *Id.* at 714.

Even if the certificate authorizing an insurer to do business is not property, we are still not required to dismiss the superseding indictment. In several places, the superseding indictment makes clear that the defendant "devised and intended to devise a scheme to defraud and to obtain money and property." Superseding Indictment at p. 23, ¶ 3, p. 39, ¶ 12, p. 45, ¶ 3 (emphasis added). Thus, more than an effort to obtain money and property is alleged. Under 18 U.S.C. § 1346, a scheme to defraud is defined to "include[] a scheme or artifice to deprive another of the intangible right of honest services." The scheme here had the effect of depriving the Commonwealth and its citizens of the honest services of its public servants who regulate insurance companies doing business within its borders. Defendant's stratagem was to deceive the Pennsylvania Insurance Department into believing that SNLIC was a healthy insurance company when it was not. Because of defendant's alleged fraud, the Department was prevented from doing its sworn duty to protect the SNLIC policyholders and the insurance buying public generally.

Defendant relies upon *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989), in support of his argument that the mail and wire fraud counts are deficient. In that case, the New York Superintendent of Insurance filed a civil RICO action, predicated on acts of mail fraud, against a corporation and its officers. The Superintendent alleged that the defendants absconded with millions of dollars from two insurers, and then hid the theft of such funds. *Id.* at 17. However, *Corcoran* is inapposite here for several reasons. First it was a civil case, applying the law prior to the enactment of 18 U.S.C. § 1346. The Court of Appeals for the Second Circuit held that the superintendent, acting as Liquidator, could not assert claims of mail fraud against defendants who allegedly looted two insurers. *Id.* at 17, 21. The court found that his complaint lacked allegations that he had been deprived of any property interest. *Id.*

at 21.[5] Unlike *Corcoran*, the government here alleges that the regulators were deprived of a property interest. *Corcoran* seemed to take a much narrower view of property than the Third Circuit set forth in *Martinez*. We are bound by *Martinez*, not *Corcoran*.[6]

Several of the defendant's other arguments address concerns that the jury will be confused by the various schemes as set forth in the superseding indictment. If a conviction occurs, he will not know upon which scheme the conviction is based. Defendant also challenges the incorporation of paragraphs and counts into other counts. Our focus on a motion to dismiss the superseding indictment is on whether the defendant himself is appropriately put on notice of the charges against him so that he may prepare his defense. To the extent that any argument concerning jury confusion has merit, it can be addressed at trial through the redaction of the superseding indictment, a detailed verdict sheet, or an explanatory charge.

Defendant's remaining arguments are without merit and require no discussion.

In conclusion, the motion of the defendant to dismiss the superseding indictment will be denied.

ORDER

AND NOW, this 22nd day of October, 1997, for the reasons set forth in the accompany Memorandum, the motion of defendant Allen W. Stewart to dismiss the superseding indictment is DENIED.

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[5] However, the court also found it "unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured." *Corcoran*, 886 F.2d at 20.

[6] To the extent the defendant also seeks dismissal of racketeering act 1 contained in RICO Count 1, his argument is also without merit. Racketeering act 1, entitled a "[s]cheme to conceal the insolvency of [SNLIC] to permit the defendant to continue to control and operate it," lists multiple acts of mail and wire fraud as its basis. These acts included sending financial statements to insurance departments, mailing checks to publishing companies for payment of printing/publication costs, as well as wiring funds.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
ALLEN W. STEWART	:	NO. 96-583

ORDER

[FILED NOV 10 1997]

AND NOW, this 10th day of November, 1997, it is hereby ORDERED that the motion in limine of defendant as to the Government's proposed production of character evidence is DENIED.

BY THE COURT:

/s/ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 96-583
	)	
ALLEN W. STEWART	)	

JUDGMENT AND SUPPLEMENTAL
PRELIMINARY ORDER OF FORFEITURE

WHEREAS, in Count 156 of the Superseding Indictment in this case, the United States sought forfeiture of certain property of defendant ALLEN W. STEWART, pursuant to 18 U.S.C. § 1963, as either property acquired or maintained as result of the unlawful racketeering activities charged in Count 1 or proceeds obtained, directly or indirectly, from those racketeering activities;

AND WHEREAS, on December 17, 1997, the trial jury found defendant ALLEN W. STEWART guilty of Count 1 and thereafter the trial jury returned a Special Verdict finding that the defendant's interest in each of the properties identified herein is subject to forfeiture;

AND WHEREAS, based upon the guilty and special verdicts returned by the trial jury against defendant ALLEN W. STEWART, entry of this Preliminary Order is appropriate pursuant to Rule 32(d)(2) of the Federal Rules of Criminal Procedure;

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The following property is hereby FORFEITED to the United States for disposition in accordance with law, subject to the provisions of 18 U.S.C. § 1963(*l*):

> **All stock held by the defendant in Conestoga Life Assurance Company (formerly known as Interfaith Life Insurance Company).**

2. All right, title and interest of defendant ALLEN W. STEWART in the property set forth above is hereby extinguished and vested in the United States of America.

3. Pursuant to 18 U.S.C. § 1963(*l*), the United States Marshal forthwith shall publish at least once for three successive weeks in a newspaper of general circulation, notice of this Supplemental Judgement and Preliminary Order of Forfeiture, notice of the United States' intent to dispose of the property in such manner as the Attorney General or this Court may direct, and notice that any person, other than the defendant, having or claiming a legal interest in the above-listed forfeited property must file a petition with the Court within thirty (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier.

This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in each of the forfeited properties and any additional facts supporting the petitioner's claim and the relief sought.

The United States shall also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of this Order, as a substitute for published notice as to those persons so notified.

4. The United States is hereby authorized to conduct discovery necessary to identify, locate, or dispose of the forfeited property named herein.

5. On the 24th day of July, 1998 at 9:30 a.m./~~p.m.~~ this Court will conduct a hearing to consider any third party petitions in accordance with the provisions of 18 U.S.C. § 1963(*l*).

6. Upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture pursuant to 18 U.S.C. § 1963(*l*), in which all interests will be addressed.

7. The Clerk of the United States District Court for the Eastern District of Pennsylvania deliver a copy of this Judgment and Preliminary Order of Forfeiture to the Marshal and to counsel for the parties.

ORDERED this 26th day of March, 1998.

/s/

HARVEY BARTLE III
United States District Court Judge

15 U.S.C. § 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

15 U.S.C. § 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

15 U.S.C. § 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to

whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.